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Supreme Court of the United States

OCTOBER TERM, 1968

No. 633

DR. ALLEN M. KREBS and WALTER D. TEAGUE, III, on their own behalf and on behalf of all other persons similarly situated,

Petitioners,

—v.—

JOHN M. ASHBROOK, JOHN H. BUCHANEN, JR., DEL CLAWSON, JOE R. POOL, RICHARD ICHORD, WILLIAM M. TUCK, GEORGE F. SENNER, JR., CHARLES L. WELTNER, EDWIN E. WILLIS, individually and as Chairmen and Members of the Committee on Un-American Activities of the United States House of Representatives, DAVID G. BRESS, United States Attorney for the District of Columbia,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioners, Dr. Allen M. Krebs and Walter D. Teague, III, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the order entered by a majority of a three-judge statutory court dissolving the statutory court and remitting the cause to a single district judge for disposition.

Opinions Below

The Court of Appeals affirmed the orders of the three-judge statutory court in a *per curiam* opinion. Judge Prettyman filed a separate concurring opinion. The *per curiam* opinion and concurring opinion are not yet reported and are reprinted herein as Appendices A and B.

The majority opinion of the three-judge court dissolving the statutory court, is reported at 275 F. Supp. 111 (1967) and is reproduced herein as Appendix C. The dissenting opinion in the three-judge court of Chief Judge Bazelon is reproduced as Appendix D. The opinion of District Judge Corcoran certifying the necessity for the convening of a three-judge statutory court is reproduced as Appendix E.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 14, 1968. The order denying petitioners' request for rehearing was filed July 12, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Whether a three-judge statutory district court duly convened to consider a request for injunctive relief against the provisions of the Legislative Reorganization Act of 1946 which embody the charter of the House Committee on UnAmerican Activities was improperly dissolved on the sole ground that an "Act of Congress" was not involved within the meaning of Title 28 U. S. C. 2282?

2. Whether the Legislative Reorganization Act of 1946 is an "Act of Congress" within the meaning of Title 28 U. S. C. 2282?

3. Whether the statute creating the House UnAmerican Activities Committee and defining its power is unconstitutional on its face

   a) as violative of the First Amendment to the Constitution of the United States,

   b) as overly broad and vague in violation of the First Amendment to the Constitution of the United States,

   c) as violative of the guarantees of due process of law contained in the Fifth Amendment to the United States,

   d) as beyond the legislative powers of the Congress of the United States,

   e) as violative of the rights of privacy of citizens guaranteed by the First, Fourth, Ninth and Tenth

Amendments to the Constitution of the United States,

f) as violative of the fundamental principles of separation of powers underlying the Constitution of the United States and in particular Article III of the Constitution of the United States vesting the Judicial Power of the United States in the courts of the United States,

g) as violative of the prohibition against Bills of Attainder set for in Article I, Section 9, Clause 1 of the Constitution of the United States.

Statutes Involved

a) Legislative Reorganization Act of 1946, Rule XI, 60 Stat. 812 Public Law 601, 79th Congress

The legislation under which the House Committee on Un-American Activities operates is Public Law 601, 79th Congress [1946]; 60 Stat. 812, which provides in significant sections:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * *

PART 2—RULES OF THE HOUSE OF REPRESENTATIVES

Rule X

Sec. 121. Standing Committees

* * * * * *

17. Committee on Un-American Activities, to consist of nine Members.

Rule XI

Powers and Duties of Committees

* * * * * *

(q)(1) Committee on Un-American Activities.

(A) Un-American activities.

(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda ac-

tivities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

* * * * *

b) Title 28 U. S. C. 2282, 62 Stat. 968

An interlocutory or permanent injunction restraining the enforcement, operation of execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any dis-

trict court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

c) Title 28 U. S. C. 2284, 74 Stat. 201

§ 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

d) Title 2 U. S. C. 192. Refusal of a witness to testify

Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100,

and imprisonment in a common jail for not less than one month nor more than twelve months." (R. S. § 102.)

Statement of the Case

a) *The complaints*

Following service upon them of subpoenas ordering their appearance before a subcommittee of the House Committee on Un-American Activities, petitioners Allen M. Krebs and Walter D. Teague, III, on their own behalf and on behalf of all others similarly situated, instituted a plenary federal action on August 15, 1966, seeking injunctive and declaratory judgment relief against the enforcement of an Act of Congress, the Legislative Reorganization Act of 1946, insofar as it sets forth Rule XI establishing the House Committee on Un-American Activities. The complaint also sought injunctive relief against threatened contempt proceedings pursuant to Title 2 U. S. C. 192, the contempt of Congress statute.

The complaint and supplementary complaint charged that the mandate of the Committee as embodied in the Legislative Reorganization Act of 1946, 60 Stat. 812 is unconstitutional on its face and as applied to petitioners.*

The complaint and supplementary complaint charged that the threatened enforcement of the unconstitutional statutes would result in serious, immediate and irreparable injury to the petitioners and the class of citizens they represent in that the enforcement would result in an immediate and irreparable chilling effect upon the exercise of

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* For the convenience of the Court we have set out in full in Appendices F, G the original complaint and the supplementary complaint filed pursuant to leave of the three-judge court.

fundamental First Amendment freedoms upon the petitioners, the class of citizens they represent as well as upon hundreds of thousands of other American citizens. Paragraph 13 of Complaint, App. F, pp. 39a, 40a. The petitioners charged that this in turn "creates a threat of immediate and irreparable injury to the fundamental interests of the Nation, since free expression—of transcendant value to all society and not merely to those exercising their rights—will be the victim." Paragraph 13 of Complaint, subsection (b).*

b) *Proceedings below*

Petitioners moved for an order convening a three-judge court pursuant to 28 U. S. C. 2282 and 2284, on August 15, 1966, and for a temporary restraining order to halt the enforcement of the subpoenas served upon them pending the determination of the constitutionality of Rule XI, the Committee charter embodied in the Legislative Reorganization Act of 1946. On that same day, after full argument District Judge Corcoran entered an order and opinion holding that a substantial constitutional question had been raised and that a justiciable case and controversy had been presented. Accordingly he certified the necessity for convening a three-judge statutory court pursuant to Title 28 U. S. C. 2282 (App. E). He simultaneously issued a temporary restraining order restraining the respondents from proceeding with the hearings of the Committee and from enforcing the subpoenas against the petitioners until the convening of the three-judge court.

That same evening, respondents moved before a panel of the Court of Appeals for leave to move to dissolve the

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*The complaints here involved are very similar to those before the Court in *Stamler* v. *Willis*, Jurisdictional Statement pending, #478 this Term of Court.

temporary restraining order entered earlier by District Judge Corcoran.

The Court of Appeals re-convened early the next morning, August 16, 1966, well before the 10 o'clock scheduled Subcommittee hearing. At that time an order was read announcing that: 1) the Court of Appeals denied leave to respondents to move for dissolution of the temporary restraining order; 2) the Chief Judge of the Circuit, in response to the certification of the District Judge, had ordered the convening of a three-judge statutory district court; 3) the three-judge court had met and dissolved the temporary restraining order on the sole ground that insufficient irreparable injury had been shown, and 4) that the three-judge statutory court would hear further applications for permanent and temporary relief.

The following day, August 17, 1966, petitioners filed a new motion for temporary injunctive relief before the three-judge statutory court and requested a hearing on the motion. Respondents moved to dismiss the complaint and opposed petitioners' motion for temporary relief. That same day, the three-judge court, *sua sponte,* directed counsel to file memoranda of law on the question as to "whether or not this case should proceed before this specially constituted three judge court or be remanded to a single district court judge".

The statutory court then sat for five months considering memoranda submitted by all parties pursuant to this *sua sponte* request. Respondents in their lengthy briefs and motions never once suggested that Section 2282 was inapplicable on the ground that an "Act of Congress" was not involved, although they raised numerous theoretical and conceptual objections to the statutory court proceeding.

On November 10, 1966, the Court of Appeals for the Seventh Circuit rejected identical objections in a similar matter and ordered the convening of a three-judge court. *Stamler* v. *Willis*, 371 F. 2nd 413. See Appendix to Jurisdictional Statement in *Stamler* v. *Willis*, #478 this Term.

On February 10, 1967, the three-judge court in this proceeding, obviously rejecting the same threshold objections to its jurisdiction disposed of by the Seventh Circuit in *Stamler*, granted petitioners leave to file a supplementary complaint, denied respondents prior motion to strike allegations in the complaint, and ordered the respondents to respond thereto within ten days after service.

On April 14, 1967, respondents filed what was in effect a combination motion to dismiss and an answer "traversing" many of the allegations in the complaint. The motion did not raise the so-called "Act of Congress" question as a ground for dissolution of the three-judge court. The only mention of the question appeared in a one page discussion at the conclusion of a lengthy "supplementary" reply memorandum filed with the motion. Although no opportunity was afforded to further brief this point and no oral argument was heard on this or any other point, on September 11, 1967, a majority of the District Court vacated the order convening the three-judge court and remitted the cause to a single District Judge for disposition.

The majority opinion acknowledged that plaintiffs raised "... constitutional questions ... (which are) not insubstantial" and further that "(a)ny decision as to the constitutionality of Rule XI might be decisive on the constitutionality of the 1946 Act." While recognizing "... that were Rule XI to be held unconstitutional such a holding would undermine the constitutionality of the like provision

of the Reorganization Act of 1946 . . ." the majority held ". . . that the activities of defendants as to which injunctive relief is sought by plaintiffs have been and are conducted under authority of a rule of the House of Representatives rather than under the authority of an Act of Congress, and that therefore, the case is not one that comes within the provisions of Section 2282."

Chief Judge Bazelon dissented from the order of dissolution. He would have held that the three-judge court should retain jurisdiction. He agreed with the majority that the constitutional question presented was "not insubstantial." Pointing out there is *dual* authorization for the House Committee on Un-American Activities, in both the Legislative Reorganization Act of 1946, as well as the inherent rule making power of the Congress, the Chief Judge would have found that ". . . this case does involve an injunction to restrain enforcement of an Act of Congress and falls within the provisions of 28 U. S. C. 2282." Accordingly Chief Judge Bazelon concluded that, having jurisdiction, the three-judge court was improperly dissolving itself.

An appeal was taken to the Court of Appeals from the District Court refusal to convene a three-judge court.* Upon argument and briefs, the Court of Appeals on May 14, 1968, affirmed the decision below in a *per curiam* opinion resting solely upon the majority opinion of the three-judge Court. A petition for rehearing was filed by petitioners and was denied by the Court of Appeals on July 12, 1968. It is from that judgment and order that petitioners appeal to this Court.

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* An appeal from an order dissolving a three-judge court, like an appeal from a refusal to convene a three-judge court, would seem to be properly taken to the Court of Appeals. *Idlewild Bon Voyage Liquor Co.* v. *Epstein*, 370 U. S. 713.

Reasons for Granting the Writ

POINT ONE

The three-judge statutory court was properly convened pursuant to Section 2282 and its subsequent dissolution on the sole ground that no "Act of Congress" was involved was wholly improper.

Preliminary Statement

This petition brings before the Court fundamental questions touching the obligation of the national courts to meet without evasion their statutory and constitutional responsibilities in affording citizens judicial protection in the exercise of those rights which only last Term this Court characterized as the "most cherished" of "the democratic ideals enshrined in (the) Constitution", *United States* v. *Robel*, 389 U. S. 258, 264. This Court has firmly stated that where "a denial of constitutionally protected rights demands judicial protection, our oath and our office require no less of us," *Reynolds* v. *Sims*, 377 U. S. 533, 565. But the record brought up by this petition reflects a deep reluctance to accept obligations and responsibilities, however awesome they may be, which the Constitution and statutes have imposed upon the federal judiciary. *Reynolds* v. *Sims*, *supra*.

1. The unusual posture of this case compels this conclusion. A single district judge duly found that the complaint presented a "not insubstantial" federal question "directed to the constitutionality of the Reorganization Act of 1946 as applied to Rule XI of the Congress" Appendix E at pp. 24a, 25a. Accordingly the single judge

certified the necessity for convening pursuant to Title 28 U. S. C. 2282 a statutory three-judge court. The Chief Judge of the Circuit exercising his statutory authority convened the three-judge court. The statutory court then sat for five months considering memoranda submitted by all parties pursuant to the *sua sponte* request of the court for argument on whether the case should proceed before a three-judge court. The respondents in their lengthy briefs and motions never even suggested that Section 2282 was inapplicable on the ground that an "Act of Congress" was not involved, although they raised a multitude of theoretical objections to the statutory court proceeding.

On November 10, 1966, the Court of Appeals for the Seventh Circuit rejected these jurisdictional objections to the convening of a three-judge court in a similar case, *Stamler* v. *Willis*, 371 F. 2d 413. Obviously also rejecting the same threshold arguments to its jurisdiction disposed of by the Seventh Circuit in *Stamler*, on February 10, 1967, some five months after the inception of the action, the three-judge court directed the respondents to respond to a supplementary complaint within ten days after service. It was perfectly clear to everyone that the statutory court had concluded that it was required to proceed.* The respondents themselves acted upon this assumption and in accordance with the order, filed what was in effect a combination motion to dismiss and an answer "traversing" many of the allegations in the complaint. The motion did not raise the "Act of Congress" question as a formal ground for dissolution, perhaps because the same defendants had

* This conclusion was buttressed by the notation on the order of February 10th, that *one* of the three judges had dissented from the order directing the defendants to respond on the ground that "intervening events had mooted the controversy."

unsuccessfully urged the point in a petition for rehearing before the Seventh Circuit in *Stamler* only a few months earlier. The first mention of the proposition appears in a casual one page discussion at the conclusion of a lengthy "supplementary" reply memorandum filed by the defendants on April 14th, 1967, some eight months after the convening of the Court. No opportunity was afforded to petitioners to respond or to argue the question orally. Nevertheless on September 11, 1967, a majority of the court, while conceding that the constitutional questions were "deemed not insubstantial" 275 F. Supp. at 113, dissolved the court over the sharp dissent of Chief Judge Bazelon, on the sole ground that an "Act of Congress" was not involved within the meaning of 28 U. S. C. 2282.

The majority, in seeking to justify its refusal to proceed to litigate the admittedly serious and substantial constitutional issues raised by the complaint, was forced to engage in involved verbal maneuvering obviously because of the difficulty of maintaining the position it sought to assume. This difficulty is understandable in light of the extraordinary fact that until the majority opinion was written, no court, legislative body or executive department ever involved in the complex litigation over the years concerning the House Un-American Activities Committee has ever doubted that an "Act of Congress", the Legislative Reorganization Act of 1946, is deeply and inextricably involved in any question touching the powers and operation of that Committee.

The opinions of this Court, majority and dissenting, the statements of the Committee itself over all the years, to say nothing of the many indictments for contempt of the Committee drawn by the Department of Justice itself, all reflect the universal and consistent recognition that an

"Act of Congress" is integrally involved in any challenge to the constitutionality of the Committee. Regardless of the many sharp and bitter divisions in the courts as to the constitutional conclusions to be drawn from the operations of this Committee, until the majority opinion below, no one has ever questioned that the power and authority of the Committee flows at least in part from the Legislative Reorganization Act of 1946.* In order to avoid the necessity of facing the responsibility imposed by the Constitution and the statutes to adjudicate the serious questions presented by the complaint, the majority of the statutory court strained to find a narrow ground of decision which not only flies in the face of precedent and statutory policy, but ignores the reality of unanimous and universal prior recognition that any inquiry into the authority of the House Un-American Activities Committee must of necessity involve the Legislative Reorganization Act of 1946, an "Act of Congress".

a) This Court has never once questioned the hitherto universally accepted proposition that the Legislative Reorganization Act is integrally involved when the legal and constitutional authority of the Committee is challenged. In opinion after opinion, Justices of this Court, whether writing for the Court, or in dissent, have uniformly referred to the Legislative Reorganization Act as a source of the

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* As we will discuss later there is, of course, as Chief Judge Bazelon points out in his dissenting opinion below a *"dual authorization"* for the Committee, 275 F. Supp. at p. 119, App. D at p. 22a, stemming from *both* the Act of Congress and the inherent power of the House to enact its own rules. For the purpose of the three-judge court question, it is of course long settled that all that is involved is whether an injunction is sought against an Act of Congress regardless of whether *other* issues may be raised. *Flast* v. *Cohen*, 392 U. S. 83 (1968), *Florida Lime and Avocado Growers* v. *Jacobson*, 362 U. S. 73, *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535. See discussion at pp. 23, 24, *infra*.

Committee's power. For example, in the first opinion of this Court to discuss in depth the Committee's scope of authority, *Watkins* v. *U. S.*, 354 U. S. 178, the Chief Justice formulated for the Court the proposition that "a year later, the Committee's charter was embodied in the Legislative Reorganization Act", 354 U. S. at 203. The Court further stated in *Watkins,* "In the Legislative Reorganization Act, the Committee on UnAmerican Activities was the only standing committee of the House of Representatives that was given the power to compel disclosures." This legal analysis was once again restated for the Court by Mr. Justice Harlan in the next reconsideration of the scope of the Committee's power in *Barenblatt* v. *United States,* 360 U. S. 109. Thus Mr. Justice Harlan repeated for the Court the *Watkins* formulation: "In 1946 the Committee's Charter was embodied in the Legislative Reorganization Act of 1946", 360 U. S. at 119.

Whether in dissent or majority the Justices of this Court have always referred to the Act as a source of Committee power. For example in his *Watkins* dissenting opinion Mr. Justice Clark characterizes the thrust of the majority opinion in this language:

> "The Court indicates that in this case the source of the trouble lies in the 'tremendous latitude' *given the Un-American Activities Committee in the Legislative Reorganization Act",*

supra, at 219 (emphasis added). The Justice went on to write,

> "The Court finds fault with the use made of compulsory process, *power for the use of which is granted the Committee in the Reorganization Act",*

supra, at 222, 223 (emphasis added). And at a later point the Justice wrote,

> "In the first place, *the authorizing language of the Reorganization Act* must be read as a whole, not dissected" *supra* at 227 (emphasis added).

Again, the Justice wrote,

> "This certainly falls within the grant of authority from the Reorganization Act"

supra, at p. 279.*

As we will point out shortly, the Committee itself has always maintained that it derives its authority from an Act of Congress as well as from the Rules of the House. The majority below attempts to brush aside the Committee's own position "understandable as it is", 275 F. Supp. at 117, by blandly asserting that the Committee's assertion of statutory authorization "does not constitute an analysis of the legal situation", 275 F. Supp. at 117, App. C at p. 17a. We do not seriously believe that anyone can brush aside on the same basis the repeated formulations of a statutory basis for Committee authority by the Justices of this Court, both in majority and dissenting opinions.

b) As Chief Judge Bazelon so strongly points out in his dissenting opinion below "the Committee itself has not hesi-

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* *Cf.* for example, the statements of Mr. Justice Whitaker and Mr. Justice Clark in their dissent in *Deutch* v. *United States,* 367 U. S. 367, "Acting under the *statutory command* of Congress . . . a Subcommittee of the House Committee on Un-American Activities conducted investigatory hearings . . . ." at p. 475, 476. See also reference to the Legislative Reorganization Act as a source of Committee authority in Mr. Justice Stewart's opinion for the Court in *Wilkinson* v. *United States,* 365 U. S. 399, 401, footnote 2.

tated to state that it derives its mandate from an Act of Congress as well as from rules of the House", 275 F. Supp. at 119. For example, in both of the legislative hearings which provide the basis for this petition and the presently pending Jurisdictional Statement in *Stamler* v. *Willis, supra,* the Chairman of the Committee asserted a statutory authorization for Committee power. Thus in both the Chicago hearings which are the basis for the *Stamler* proceedings, and the Washington hearings involved in the present action, the Chairman described the dual authorization of the Committee in these words:

> "To provide factual information to aid the Congress in the proposal of any necessary remedial legislation in fulfillment of the authority and directions contained in the mandate to the committee by House Resolution 8 of January 4, 1965, and Public Law 601 of the 79th Congress." See Hearings on H. R. 12047, H. R. 14925, H. R. 10175, H. R. 17140 and H. R. 17194, August 16-19, 1966; 89th Congress 2nd Session, and Hearings before House Un-American Activities Committee, Part 1, May 25, 26, 27 and June 22, 1965, 89th Congress 1st Session.

And to further emphasize the statutory basis for the Committee's power, the official report of both the Chicago and Washington hearings opens with the following flat assertion:

> "The legislation under which the House Committee on Un-American Activities operates is Public Law 601, 79th Congress (1946); 60 Stat. 812 . . ." See Committee Reports of Washington and Chicago hearings, *supra.*

The district court majority admits that the Committee has consistently over the years asserted a statutory basis for its authority as well as the inherent rule making power of the House.* It attempts, however, to discount the Committee's own assertions of a statutory basis for its authority as not constituting "an analysis of the legal situation", 275 F. Supp. at 117. We have pointed out above that the Committee's assertions have in fact coincided with this Court's own formulations of the bases for Committee authority. Furthermore as this Court pointed out in *Barenblatt* v. *U. S., supra,* in Mr. Justice Harlan's opinion for the majority, the Committee's constant assertions over the years of a statutory basis for its power is highly relevant in determining "the proper meaning of an authorization to a congressional committee", 360 U. S. at 117. This question as to whether there is any *statutory* basis for Committee authority raised for the first time in the opinion below, in the words of *Barenblatt,* "comes to us with a 'persuasive gloss of legislative history' ", 360 U. S. at 118. And it is perfectly clear that this "persuasive gloss" reveals that the Congress itself has always considered that statutory authorization exists for Committee authority.

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* See footnote 1 to Chief Judge Bazelon's dissenting opinion: "1. See e.g., House Committee on Un-American Activities, Annual Report for the Year 1961, 145, stating that the Committee has a statutory basis in Public Law 601—the Legislative Reorganization Act of 1946—as well as in the Rules of the House of Representatives. The report also spoke of the purpose of *Congress* in the creation of this committee and of the *congressional* mandate, *ibid.* [Emphasis added.] See also House Committee on Un-American Activities, Annual Report for the Year 1963, 123.

Every publication of the Committee begins with the recital that "The legislation under which the House Committee on Un-American Activities operates is Public Law 601, 79th Congress [1946]; 60 Stat. 812 * * * ."

c) Perhaps the most forceful statements of the existence of a statutory basis for Committee power come from the Department of Justice itself. The Department, appearing below as attorneys for the Committee defendants, has not hesitated to express in the strongest terms the "legal analysis," *cf.*, the majority opinion below at p. 117, that the Committee's authority rests in a significant way upon an "Act of Congress", the Legislative Reorganization Act of 1946. Thus, for example, in the indictments of appellants Stamler and Hall in *Stamler* v. *Willis,* presently pending on Jurisdictional Statement #478 October Term, 1968, presented by representatives of the Department of Justice to the Grand Jury, the following flat assertion is made as to the basis for Committee authority:

> "The Committee on UnAmerican Activities of the House of Representatives, *created and authorized by the Legislative Reorganization Act of 1946, chapter 753, Section 121 and 136, Public Law 601, 79th Congress, 2nd Session, 60 Stat. 817, 822, 823, and 878* and by House Resolution 8, of the 89th Congress . . . ." [Emphasis added.]

See *Stamler* v. *Willis,* #478 this Term.*

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*Many recent indictments for contempt of this Committee appear to assert this same *dual* authorization. See for example the indictment before the Court in *Gojack* v. *United States,* 384 U. S. 704. See also the indictments in *U. S.* v. *Russell Nixon*—Criminal #1170-64—District of Columbia; *U. S.* v. *Dagmar Wilson*—Criminal #1171-64—District of Columbia and *U. S.* v. *Donna Allen*—Criminal #1172-64—District of Columbia. The opening paragraph of each indictment reads as follows: "The Committee on UnAmerican Activities of the House of Representatives, *created and authorized by the Legislative Reorganization Act of 1946,* Sec. 121 (q), (60 Stat. 828), and by Sec. 136 thereof, and by H. Res. 5, 88th Congress, at a meeting on February 19, 1964, by motion

Thus it appears that the Department of Justice itself shares the "legal analysis" formulated by Chief Judge Bazelon in his opinion below, that Congress has "established a dual authorization for the House Committee on Un-American Activities", 275 F. Supp. at 119, and that accordingly Committee power rests squarely upon an "Act of Congress" as well as the rule making power of the House.

What emerges from this posture of the problem is a simple and stark fact. Prior to the last-minute refusal of the majority of the three-judge court to proceed with their statutory duties to adjudicate the issues in this case, no one ever suggested that an Act of Congress is not significantly involved in a challenge to the authority of this Committee. The situation is of course completely to the contrary. Both this Court, the Committee, as well as the Department of Justice, representing the respondents in this action, have consistently and uniformly acknowledged the existence of a statutory basis for the Committee's power. Whatever else may be contested in the complex arena of problems concerning the Committee's legality, the fact that an "Act of Congress" is intimately involved in any challenge to the Committee's authority has never been in issue. For the majority of the three-judge court to decline to exercise its statutory jurisdiction on this ground is a serious breach of the high duties of the federal courts to face unflinchingly the responsibilities placed upon them.

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carried, authorized hearings to be conducted in Washington, D. C., or at such other place or places as the Chairman thereof may designate, on such date or dates as the Chairman may determine, relating to the following matter within the scope of the authority of the Committee." (Emphasis added.)

Reynolds v. *Sims,* 377 U. S. 533, 565. The order dissolving the three-judge court on this ground should be summarily reversed.

2. The majority below concedes as it must, that petitioners have sought in the words of 28 U. S. C. 2282, "an interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States," namely the relevant provisions of the Legislative Reorganization Act, 275 F. Supp. at 112, 113. It seeks to avoid the obvious conclusion that a three-judge court is statutorily mandated by arguing that the statute itself is a reflection or codification of the House's inherent rule making powers. But the fact that an alternative source of authority exists which might not by *itself* invoke the command of 2282 to convene a three-judge court does not divest the statutory court of its jurisdiction to proceed. It has been long settled by this Court that when issues required to be considered by a three-judge court are joined with issues not necessarily heard by such a statutory court, the three-judge court does not lose its jurisdiction to proceed. This Court restated this governing proposition only last Term in *Flast* v. *Cohen,* 392 U. S. 83, 88 S. Ct. 1942 (1968). The Government urged in *Flast,* a position analogous to that assumed by the majority below. The words of the Court in sustaining the jurisdiction of the three-judge court in *Flast* are dispositive here:

> "Secondly, the Government argues that a three-judge court should not have been convened because appellants question not the constitutionality of the Elementary and Secondary Education Act of 1965 but its administration. The decision in *Zemel* v. *Rusk,* 381

> U. S. 1, 85 S. Ct. 1271, 14 L.Ed. 2d 179 (1965), is dispositive on this issue. It is true that appellants' complaint states a non-constitutional ground for relief, namely, that appellees' actions in approving the expenditure of federal funds for allegedly unconstitutional programs is in excess of their authority under the Act. However, the complaint also requests an alternative and constitutional ground for relief, namely, a declaration that, if appellees' actions are within the authority and intent of the Act, the Act is to that extent unconstitutional and void. The Court noted in *Zemel* v. *Rusk,* supra, [W]e have often held that a litigant need not abandon his nonconstitutional arguments in order to obtain a three-judge court. 381 U. S., at 5-6, 85 S. Ct., at 1275. See also *Florida Lime & Avocado Growers* v. *Jacobsen,* 362 U. S. 73, 80 S. Ct. 568, 4 L.Ed. 2d 568 (1960); *Allen* v. *Grand Central Aircraft Co.,* 347 U. S. 535, 74 S. Ct. 745, 98 L.Ed. 933 (1954). The complaint in this case falls within that rule."

As in *Flast,* the complaint here "falls within" the rule of *Zemel, Florida Lime & Avocado Growers,* and *Allen* v. *Grand Central Aircraft,* all *supra.* The petitioners having sought an injunction against the enforcement of provisions of the Legislative Reorganization Act, a three-judge court is required to sit whether or not other questions are raised by the complaint which might not require the convening of a statutory court.

3. In essence the position of the majority below finally centers upon an effort to erase the existence of the statute entirely. Conceding that "any decision as to the constitu-

tionality of Rule XI might be decisive on the constitutionality of the 1946 Act . . . ", 275 F. Supp. at 117, and that "were Rule XI to be held unconstitutional such a holding would undermine the constitutionality of the like provisions of the Reorganization Act of 1946 . . . ", 275 F. Supp. at 118, the majority below seeks to avoid the obvious conclusion that an attack upon this dual authority of the Committee of necessity requires the convening of a three-judge court by simply ignoring the statute. Thus the majority ultimately avoids its judicial responsibilities by wishing the Legislative Reorganization Act out of existence. In an extraordinary feat of legal surgery, the lower court majority simply carves away the statutory basis for Committee power by the bland assertion that the Resolution "*alone* was the grant of authority under which" the Committee operates, 275 F. Supp. at 119 (emphasis added). But this assertion, necessary to avoid the rule of *Flast,* and *Florida Lime and Avocado Growers,* not only flies in the face of the uniform formulations of a dual and statutory source of Committee authority contained in the opinions of this Court, in the statements of the Committee itself and in the position of the Department of Justice, as we have discussed above, but is in stark contradiction to the majority's *own* concession that the Act contains provisions identical to the Resolution. 275 F. Supp. at 118. Thus the majority's assertion that the Resolution "alone" is the source of Committee power requires the absurd assumption of non-existence of the statute. But the statute exists and cannot be wished away. Having sought an injunction against its provisions, the statutory mandate of *2282* cannot be avoided by an assumption, itself groundless, that the enactment of the Legislative Reorganization Act by the House and Senate in 1946 was a meaningless, useless,

pointless, gesture. The statute exists, and as this Court has taught on innumerable occasions, a court will not engage in the presumption that there is no reason or purpose behind a Congressional enactment. In 1946 the Congress believed it to be desirable that the Committee's Charter be "embodied in the Legislative Reorganization Act". Cf., *Watkins* v. *U. S., supra, Barenblatt* v. *U. S. supra.** No court may cavalierly ignore this Congressional action on its own assumption that it was useless or unnecessary, in order to avoid the statutory obligation to proceed with adjudication of serious constitutional questions.

4. The lower court majority further suggests that even assuming that the Legislative Reorganization Act, an "Act of Congress," is a dual source of authority for the Committee it may not be the "type" of "Act of Congress" referred to in Section *2282*. But as Chief Judge Bazelon points out "Section 2282, however, speaks of 'any Act of Congress' and neither Congress nor the Supreme Court has provided us with sufficient guidance to carve out exceptions to it." 275 F. Supp. at 120.

There is some question in the courts as to whether "Act of Congress" may include within the meaning of Section *2282* legislative action which is not technically a statute

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* The legislative history of the Act reveals that Congress placed great importance upon creating a statutory basis for its Committee structure which would not replace its inherent rule making power but would be a dual source of authority. See, for example, the discussion of Mr. Monroney, one of the sponsors of the legislation, "There is only one primary purpose considered in this bill. It is non political in its approach. It deals not with any ideologies or anything except the functional reorganization of Congress.

"One test and one test alone has been applied . . . and that is simply this question, 'Will it help the Congress to do a better job?'" Cong. Rec., 79 Cong., 2nd Session, Vol. 92, p. 10039.

enacted by both houses and signed by the President.* This problem is of course not presented in this case since the Legislative Reorganization Act was duly approved by both Houses and signed by the President and is accordingly within the strictest reading of the statute an "Act of Congress". Nor are the provisions of the Act establishing the House Committee on Un-American Activities provisions which do not have "general application in the United States," *cf. Ex Parte Cogdell,* 347 U. S. 163 (1951).** As this Court has observed in *Watkins* v. *U. S., supra,* the activities of this Committee have cast a broad shadow

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* Compare *Methodist Federation for Social Action* v. *Eastland,* 141 F. Supp. 779 (App. D. C. 1956) (a three-judge court convened to consider a Concurrent Resolution of the House Senate) with *Powell* v. *McCormack,* 266 F. S. 354 (1967) (refusal to convene a three-judge court to consider solely the effect of a resolution of the House refusing to seat a Congressman). See also *A. F. L.* v. *Watson,* 327 U. S. 582; *Bond* v. *Floyd,* 385 U. S. 116 (three-judge court held properly convened to consider constitutionality of action of one House of State legislature in refusing to seat elected member).

** *Ex Parte Cogdell,* 342 U. S. 163 (1951) suggests that Section 2282 might not be applicable where acts of specific and limited geographic application are challenged. *Cogdell* involved legislation affecting only the District of Columbia. Although this Court raised the question of whether federal courts should narrow the scope of Section 2282 to include only those " . . . laws having general application in the United States", the parties later withdrew their appeal in the Court of Appeals and the matter of such a suggested limitation on the scope of 2282 was never decided. However, since the *Cogdell* decision legislation having reference and application only to the District of Columbia has in fact recently been referred to the consideration of a statutory three-judge federal court. See *Hobsen* v. *Hansen,* 252 F. Supp. 4, D. C. D. C. (1966). See also *Osage Tribe of Indians* v. *Ickes,* 133 F. 2d 47, cert. denied, 319 U. S. 750, where a three-judge court was convened to examine a strictly local issue namely "an act for the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes." See also the recent decision in *Flast* v. *Cohen, supra,* and *Moody* v. *Flowers,* 387 U. S. 97 (1967).

across the entire life of the Nation. It has held hearings in at least thirty major American cities. It has subpoenaed more than 2,000 witnesses. It has cited over 170 persons for contempt since 1946. As this Court said in *Watkins*, "the Committee conceived of its task in the grand view of its name. Un-American activities were its target no matter how or where manifested." 354 U. S. at 203. The provisions of this Act are neither local in nature nor do they deal with purely internal affairs of the House of Representatives unrelated to the rights and privileges of citizens. Cf., *Watkins* v. *United States, supra,* at p. 197. The Act in fact, sanctions "an entire regulatory scheme", cf. *Zemel* v. *Rusk,* 381 U. S. 1, which intimately and directly affects the life of the Nation and the rights of individual citizens. Cf., *Watkins* v. *United States, supra.* It is precisely the type of Act which Section *2282* was designed to encompass. *Zemel* v. *Rusk,* 381 U. S. 1.*

This Court has said on numerous occasions that the three judge court statutes must be strictly applied. *Swift and Company* v. *Wickham,* 387 U. S. 111. This warning is directly in point here. The lower court may not substitute

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* *Zemel* v. *Rusk,* 381 U. S. 1, 7, n. 4 (1965), emphasizes the reason for the creation of the three-judge court procedure and its applicability to this case. This Court there pointed out:

"The legislative history of Section 2282 . . . indicates that (this section was) enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order."

The Court further stated:

". . . the convening of a three-judge court . . . surely coincides with the legislative policy underlying the passage of Section 2282 . . . . Appellant in this case does not challenge merely 'a single unique exercise' of the authority, cf. *Phillips* v. *U. S.,* 253. On the contrary, this suit seeks to 'paralyze totally the operation of an entire regulatory scheme.' Indeed, a regulatory scheme designed and administered to promote the security of a nation."

its own beliefs as to what ought or ought not to be the scope of the three-judge court statute for the strict words of the statute. The Legislative Reorganization Act is in every sense an "Act of Congress." An injunction has been sought to restrain its enforcement on the ground of repugnance to the Constitution. A substantial constitutional question has been raised. Under the precise command of the statute a three-judge court is required to sit. It should be instructed to do so.*

5. Every policy consideration underlying the enactment of the three-judge court statutes cry for their application to this case. As the Court has said in *Zemel* v. *Rusk, supra* "the legislative history of Section 2282 . . . indicates that (this section) was enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by the issuance of a broad injunctive order." 381 U. S. at p. 7. Even the lower court majority concedes that "as a matter of policy there would seem to be good reason for a three-judge court to pass on a constitutional challenge to the authority of a congressional committee." 275 F. Supp. at 118.**

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* In addition to the Legislative Reorganization Act of 1946 injunctive relief is sought against the enforcement of another "Act of Congress", Title 2 U. S. C. 192, the contempt statute. The complaint seeks injunctive relief against criminal proceedings threatened to be brought pursuant to this statute on the ground that the statute as thus applied would be repugnant to the Constitution. Such a request also requires the convening of a three-judge court. *Stratton* v. *St. Louis Southwestern Ry.*, 282 U. S. 10; *Ex Parte Branford*, 310 U. S. 354, 361; see also *Stern and Grossman*, Supreme Court Practice (1962 ed.) at p. 45, "An attack upon the validity of a statute as applied would doubtless be sufficient for the invocation of section 2282."

** The events which directly followed District Court Judge Corcoran's order certifying the convening of a three-judge court and

All the policy reasons which underlie the requirement of a three-judge court come into play in this case. Here, a serious and substantial constitutional challenge is presented to a Congressional scheme of regulation which has its impact throughout the entire Nation. Deep feelings are present in the legislature concerning its right to proceed with these operations. Injunctive relief to these petitioners has already "aroused" the "ire" of many legislators. See Cong. Rec. pp. 19541-19545, 89th Cong., 2nd Session, August 16, 1966. Cf. *Swift & Co.* v. *Wickham, supra,* at p. 127. "Requiring the collective judgment of three judges and accelerating appeals to this Court . . ." *Swift & Co.* v. *Wickham, supra,* will in this case not only "safeguard important state interests", 382 U. S. at 127, but will protect and preserve the integrity of the federal judicial system without retreating from its high obligation to provide a forum where a "denial of constitutionally protected rights demands judicial protection." *Reynolds* v. *Sims,* 377 U. S. 533, 565.

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the issuance of a restraining order made it painfully obvious that this case was exactly the type of action for which Section 2282 was designed. Following Judge Corcoran's order, the Chairman of the subcommittee of the House Committee on Un-American Activities, Mr. Pool, which had subpoenaed petitioners to appear before it on August 16, 1966, stated plainly that he intended to violate the court order and proceed with the scheduled hearings. See *New York Times,* August 16, 1966, 1:1 and *New York Post,* August 16, 1966, p. 5. With cries of "judicial dictatorship," "act of violence," "incompetent" and "pip-squeak judge" members of Congress threatened Judge Corcoran with citation for contempt and even impeachment. Cong. Rec. pp. 19541-19545, 89th Cong., 2nd Sess., August 16, 1966. The *Washington Post* quoted Chairman Pool as having said, "I don't think the Court order is worth the paper it is written on." "I will go to jail and stay there until hell freezes over to prove my point."

6. The decision of the majority below is in sharp conflict with the decision of the Court of Appeals for the Seventh Circuit in *Stamler* v. *Willis,* 371 F. 2nd 413 (1966) and should be reviewed and reversed by this Court.

In *Stamler* the Court of Appeals for the Seventh Circuit, in an analogous situation, ordered the convening of a three-judge statutory court. The Court of Appeals held *inter alia*:

> "The complaints alleged generally that the interpretation of section 18 of Rule XI [4] as expressed by the continued conduct of the Subcommittee of the House Un-American Activities Committee attributes a meaning to the rule which renders it unconstitutional and that this conduct consisted of the exposure of witnesses, including plaintiffs, to public scorn and obloquy and harassment and intimidation of these witnesses without any legislative purpose but rather to chill and deter them and others in the exercise of their first amendment rights.
>
> The allegations raise a substantial constitutional question not foreclosed by the Supreme Court in *Barenblatt* v. *United States,* 360 U. S. 109, 79 S. Ct. 1081, 3 L. Ed. 2d 1115 (1959). 371 F. 2d at 414."

The appellees in *Stamler,* the same respondents as here, had advanced to the Seventh Circuit a host of conceptual objections to the convening of the three-judge court. None of these questions included the argument that an "Act of Congress" within the meaning of Section 2282 was not involved. However, on January 3, 1967, in a petition for

rehearing, the appellees first raised the question as a ground for denying the convening of a court. It was fully briefed by both appellants and appellees, and on February 10, 1967, the Seventh Circuit, sitting *en banc* denied the petition for rehearing. After several extensions of time the Government determined not to appeal the Seventh Circuit decision in *Stamler* to this Court. See Jurisdictional Statement in *Stamler* v. *Willis,* #478, this Term. After the three-judge Court was convened in *Stamler,* the Government again urged the "Act of Congress" question upon the three-judge court in a motion to dismiss, and once again the point was rejected in a unanimous denial of the motion to dismiss. Thus both the Seventh Circuit and the statutory three-judge court convened in *Stamler* v. *Willis* have squarely rejected the position advanced by the courts below. Accordingly, the Circuits being in sharp conflict on this issue, the certiorari jurisdiction of this Court is properly invoked and should be exercised. *Wyandotte Transportation Co.* v. *U. S.,* 386 U. S. 906.

Every consideration underlying the exercise of certiorari jurisdiction calls for this Court's intervention in this proceeding. There is a deep seated national interest in the preservation of legal arenas for the resolution of fundamental constitutional questions which touch the most sensitive issues of the liberties of citizens and the prerogatives of the legislature. The test of a system of law is the strength and willingness of its courts to accept the duty imposed upon them to adjudicate controversies of a serious nature unflinchingly and without bending to the passions of the times. The reluctance of the majority of the three-judge court below to accept its statutory and constitutional responsibilities to proceed to adjudicate the serious and

substantial questions presented in the complaint is not only, as we have here shown, wholly without authority of law. In the deepest sense it tends to undermine the confidence of the citizenry that institutions of law are available to promptly and effectively resolve even the most sensitive of constitutional questions. In these difficult days for the nation the early words of this Court that this is a "government of laws and not men" assume ever increasing importance. A "government of law" requires courts which will do their statutory and constitutional duty. This Court should promptly and summarily reverse the dissolution order of the three-judge court below and direct the statutory court to proceed with the adjudication of the controversy.

POINT TWO

The question of the constitutionality of the mandate of the Committee as embodied in the Legislative Reorganization Act of 1946 is a serious and substantial issue which should be considered by this Court.

Petitioners have suggested in Point One of this Petition that the Court may well consider summary reversal without oral argument of the order below and a direction to the three-judge court to proceed promptly with the adjudication of the controversy.

If, however, the Court determines to consider the questions raised by the Petition in a plenary fashion, Petitioners respectfully would urge the Court to bring up for review at this time the serious and substantial question raised by the challenge to the constitutionality of the mandate of the Committee as embodied in the Legislative Re-

organization Act of 1946. The issue of the facial constitutionality of the mandate is ripe for adjudication at this stage of the proceeding, and we would urge the Court that both the interests of substantial justice to the Petitioners as well as the most fundamental considerations of national policy suggest that the Court exercise its certiorari jurisdiction to review these issues at this time.

1. We do not believe that it is necessary to argue at any length that questions touching the constitutionality of Rule XI of the Committee, as embodied in the Legislative Reorganization Act are serious and substantial within the meaning of the certiorari jurisdiction. In this respect Petitioners respectfully adopt the arguments advanced in Point III of the Jurisdictional Statement now before the Court in *Stamler et al.* v. *Willis,* #478 this Term. This Court has made it amply clear that it views these questions as serious and substantial and not foreclosed for review. In the most recent case touching the operations of the House Committee, *Gojack* v. *United States,* 384 U. S. 702 (1966), the Court granted certiorari on the following question *inter alia*:

> "Whether the statute creating the Committee and defining its power is unconstitutional on its face or as applied in this case in that
>
> (a) it exceeds the legislative power of Congress,
>
> (b) it is too vague and indefinite,
>
> (c) it abridges rights secured by the First Amendment,
>
> (d) it violates the constitutional principle of separation of powers."

In *Gojack* the Court found it unnecessary to reach this question since as Mr. Justice Fortas pointed out for the Court:

"Since we decide the present case on other grounds, it is not necessary nor would it be appropriate to reach the constitutional question", 384 U. S. at 706.

The case arose through the conventional channels of a criminal appeal and the Court was able to address itself to the precise relief sought by the litigant, the reversal of the criminal conviction, on grounds which alleviated the necessity for reaching the broader constitutional issues. The Court was, however, careful to emphasize that these questions remain serious, undecided, and deeply troublesome. Not only did the Court make it perfectly clear that it was not foreclosing the constitutional questions, 384 U. S. 706, but once again the Court took pains to remind the nation that these issues remain unresolved. As the Court pointed out in explaining what it was *not* deciding in *Gojack*— " . . . the present case presents a formidable problem of the 'vice of vagueness' which troubled the Court in *Watkins,* 354 U. S. at 209. We do not reach that problem because we decide the case on other grounds" 348 U. S. 709, fn. 7.

We respectfully suggest to the Court that today, in this case, in the words of *Gojack,* it is now "necessary" and "appropriate to reach the constitutional question", cf. 384 U. S. at 706.

2. In *Watkins,* the Court, with only one dissenting Justice, discussed the fundamental constitutional vice infecting the Committee's mandate in words which the history of the following years has proven sadly prophetic.* The

* Petitioners respectfully call to the attention of the Court Appendices 4 and 5 of the Jurisdictional Statement filed in *Stamler* v. *Willis,* #478 this Term and request the Court to consider the material contained therein in connection with this Petition.

analysis of the Chief Justice, written for the Court in 1957, read within the context of the presently developing "national crisis" in the preservation of fundamental liberties,* and viewed in the perspective of the new insight into judicial responsibility in protecting the "precious rights" of the First Amendment reflected in the teachings of *Button, Dombrowski, Zwickler, Keyishian,* and *Elfbrandt*** reveal why it is now "necessary" to reach this profoundly important constitutional question. We set out here the words of *Watkins* because we believe that they are, in the context we have alluded to, determinative in the consideration of why the Court should presently face these momentous issues:

> "It would be difficult to imagine a less explicit authorizing resolution. Who can define the meaning of 'un-American'? What is that single, solitary 'principle of the form of government as guaranteed by our Constitution'? There is no need to dwell upon the language, however. At one time, perhaps, the resolution might have been read narrowly to confine the Committee to the subject of propaganda. The events that have transpired in the fifteen years before the interrogation of petitioner make such a construction impossible at this date.
>
> "The members of the Committee have clearly demonstrated that they did not feel themselves restricted in any way to propaganda in the narrow sense of the

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* See Mr. Justice Fortas, Address on New York University Law School Convocation, October 3, 1968, New York Times, October 4, 1968.

** *NAACP* v. *Button,* 371 U. S. 415; *Dombrowski* v. *Pfister,* 380 U. S. 479; *Zwickler* v. *Koota,* 389 U. S. 241; *Keyishian* v. *Board of Regents,* 385 U. S. 589; *Elfbrandt* v. *Russell,* 384 U. S. 11.

word. Unquestionably the Committee conceived of its task in the grand view of its name. Un-American activities were its target, no matter how or where manifested.

"Combining the language of the resolution with the construction it has been given, it is evident that the preliminary control of the Committee exercised by the House of Representatives is slight or non-existent. No one could reasonably deduce from the charter the kind of investigation that the Committee was directed to make. . . .

"The Government contends that the public interest at the core of the investigations of the Un-American Activities Committee is the need by the Congress to be informed of efforts to overthrow the Government by force and violence so that adequate legislative safeguards can be erected. From this core, however, the Committee can radiate outward infinitely to any topic thought to be related in some way to armed insurrection. The outer reaches of this domain are known only by the content of 'un-American activities.' Remoteness of subject can be aggravated by a probe for a depth of detail even farther removed from any basis of legislative action. A third dimension is added when the investigators turn their attention to the past to collect minutiae on remote topics, on the hypothesis that the past may reflect upon the present. . . .

"The Committee is allowed, in essence, to define its own authority, to choose the direction and focus of its activities. In deciding what to do with the power that has been conferred upon them, members of the Com-

mittee may act pursuant to motives that seem to them to be the highest. Their decisions, nevertheless, can lead to ruthless exposure of private lives in order to gather data that is neither desired by the Congress nor useful to it. Yet it is impossible in this circumstance, with constitutional freedoms in jeopardy, to declare that the Committee has ranged beyond the area committed to it by its parent assembly because the boundaries are so nebulous." 354 U. S. at pages 202, 203, 204, 205 (Court footnotes omitted).

This analysis of the Court in *Watkins* which we have been increasingly reminded of in recent opinions, cf. *Gojack* v. *United States, supra, Elfbrandt* v. *Russell, supra, DeGregory* v. *Attorney General of New Hampshire,* 383 U. S. 743, places sharply in focus the urgent necessity for a reconsideration of the five to four opinion of the Court in *Barenblatt* v. *United States, supra.* As the Court has now taught us from *Button* to *Keyishian* the fundamental evil which flows from government regulations which are vague or overbroad in the area of the First Amendment is not primarily the injuries, as serious as they are, to the individuals immediately affected by the legislation. Rather it is the impact of the "*in terrorem*" effect of such sweeping regulations, cf. *Keyishian* v. *Board of Regents,* 365 U. S. at 601, upon the exercise of fundamental liberties by the citizenry itself. In the now often repeated words of the Court in *Dombrowski* the ultimate evil is that "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." 380 U. S. at 486.

Perhaps more so than any other phenomena of governmental regulation in contemporary history, the House Committee on Un-American Activities has had this *"in terrorem"* effect upon the exercise of democratic liberties by American citizens. The devastating effect of this fantastically overbroad and vague mandate upon the free functioning of our democratic process has been the occasion of many opinions of members of this Court. See for example the opinion of Mr. Justice Black, concurred in by the Chief Justice and Mr. Justice Douglas in *Barenblatt* v. *U. S.*, 360 U. S. at 134; the dissenting opinion of Mr. Justice Douglas, concurred in by the Chief Justice, Mr. Justice Black and Mr. Justice Brennan in *Braden* v. *United States*, 365 U. S. at 446.*

In *Watkins*, in 1957 the Court expressed the hope that the Congress would itself cure this evil which casts its shadow over every area of American life. 354 U. S. at 215. Today, eleven years later, even though the Chairman of the Sub-Committee of the Committee presently sitting in Washington, Congressman Ichord, candidly admits on the floor of the House that "admittedly, the above language (Rule XI, the Committee's mandate) is extremely vague

* Cf. the recent concurring opinion of Mr. Justice Brennan in *Robel* v. *United States*, 389 U. S. 258, 88 S. Ct. at 430, "The area of permissible indefiniteness narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights, as does §5(a)(1)(D). See *Barenblatt* v. *United States*, 360 U. S. 109, 140, n. 7, 79 S. Ct. 1081, 1100, 3 L. Ed. 2d 1115 (dissenting opinion, Black, *J.*). This is because the numerous deficiencies connected with vague legislative directives, whether to a legislative committee, *United States* v. *Rumely*, 345 U. S. 41, 73 S. Ct. 543, 97 L. Ed. 770; to an executive officer, *Panama Refining Co.* v. *Ryan*, 93 U. S. 388, 55 S. Ct. 241 79 L. Ed. 446; to a judge and jury, *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 465, 47 S. Ct. 681, 687, 71 L. Ed. 1146; or to private persons, *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584; see

and indefinite" Cong. Rec., July 19, 1968, H. 7092, the Committee continues to operate under its concededly unconstitutional mandate in a manner which has caused leading organs of public opinion in the country to call urgently for its elimination. The hearings in Washington in 1966 which are the gravamen of this action caused the New York Times to conclude editorially that the Committee "suffer(s) from an incurable defect" that "strikes at freedom itself" which can be cured "only by radical surgery" New York Times, August 22, 1966. The present hearings in Washington evoked the response from the Washington Post that "concern for the country" requires drastic curtailing of this type of legislative activity. Washington Post, October 4, 1968.*

Schechter Poultry Corp. v. *United States,* 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, are far more serious when liberty and the exercise of fundamental rights are at stake. See also *Gojack* v. *United States,* 384 U. S. 702, 86 S. Ct. 1689, 16 L. Ed. 2d 870."

* The present hearings of the Committee in Washington, D. C. presently being conducted by the Committee reveal that the Committee has not yet heeded this Court's constant admonition that "there is no congressional power to investigate merely for the sake of exposure or punishment, particularly in the First Amendment area" *Gojack* v. *United States,* 384 U. S. at 711, Fn. 9.

On September 20, 1968, the Chicago Sun-Times, in a news story on the present Committee hearings touching events occurring during the Democratic National Convention quoted the staff director of the Committee as stating:

> "To investigate groups involves a long, drawn-out hearing that takes several weeks.
>
> "We're interested in exposing the extent of subversive involvement in creating the disruption." "Daley may be HUAC Witness," *Chicago Sun-Times,* September 20, 1968, p. 1.

The witnesses called before the present hearings have initiated litigation similar in character to the present case, challenging *inter alia* the constitutionality of Rule XI embodied in the Legislative Reorganization Act. Quentin Young, Plaintiff, v. Edwin E. Willis, et al., Defendants, Civil Action #2455-68; Renard G. Davis, et al.,

Over the years the legislature has made no significant move to accept the Court's admonition in *Watkins* to remedy the evil. In the most classic sense this case now calls for the exercise of this Court's historic role as the final and ultimate guardian of constitutional law. *Marbury* v. *Madison,* 1 Cranch 137. No issue of separation of powers is here involved. From *Watkins* to *DeGregory* this Court has reaffirmed the concept that legislative investigative power, like all governmental action, must bow to the mandate of the First Amendment. The evil which flows from the vague and overly broad mandate, the "chilling effect" upon the exercise of democratic liberties, *Dombrowski* v. *Pfister, supra,* looms ever larger in a period of "national crisis" in the existence of civil liberties. Cf. Mr. Justice Fortas, Address on New York University Law School Convocation, October 3, 1968, *supra.*

This proceeding, in response to the teachings of *Button, Baggett, Dombrowski* and *Keyishian* calls upon the Court to afford judicial relief against the "in terrorem" device itself. As the Court has recently so often pointed out where the evil is the "chilling effect" created by a vague or overbroad statute, ultimate success or failure in a criminal proceeding affords no remedy. Cf. Mr. Justice Bren-

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Plaintiffs, v. Edwin E. Willis, et al., Defendants, Civil Action #2441-68.

In respect to the hearings in 1966 which occasioned the present action, Rep. Joe Pool, Chairman of the Sub-Committee which subpoenaed petitioners to appear before it, stated

> "I think that the House Committee on Un-American Activities is actually a 'court of last resort' to the people of America to come and find out what's going on in the way of infiltration by enemies, the Communists and by other groups who would destroy America as we know it." *Manion Forum, Weekly Broadcast No. 718,* July 7, 1968.

nan's discussion in *Dombrowski* v. *Pfister, supra.* This warning is particularly appropriate here. The long drawn out channels of a criminal appeal are not designed to provide the protection to the broad societal interests involved in the elimination of facially unconstitutional enactments whose vague or overbroad sweep cast a pall upon the free exercise of democratic rights.

If the mandate of the Committee, as embodied in the Legislative Reorganization Act, is unconstitutionally vague and overly broad in the area of the First Amendment, then, we respectfully suggest, this Court has the duty and responsibility to adjudicate the question and to order the appropriate judicial relief.* The action presently before the Court brought up by this petition directly raises this issue. Neither the rights of Petitioners nor the broad interests of society are served by a delay in the constitutional adjudication sought. Under the teachings of this Court from *Button* to *Keyishian* the federal judiciary may not abstain from meeting its responsibility in striking down governmental action vague or overly broad in the area of the First Amendment. In the deepest sense this case calls upon the Court to face directly the challenge of the times—a reaffirmation that "the democratic ideals enshrined in (the) Constitution and the most cherished of those ideals [which] have found expression in the First Amendment" *Robel* v. *United States,* 389 U. S. 258 (1967) will not be swept away in the stormy tensions of the "national crisis" of which Mr. Justice Fortas warns. The time has come for the Court to consider the juridical conclusions which now flow from the analysis in *Watkins*

* See *HUAC and the "chilling effect": The Dombrowski Rationale Applied,* John Hanks, 21 Rutgers Law Review 679.

in 1957 of the sweeping constitutional infirmities in the legislative mandate of the House Committee on UnAmerican Activities.

We respectfully urge the Court, should it grant plenary consideration of the issues raised in this petition, to accept for review the serious and substantial questions involved in the challenge to the facial constitutionality of the legislative mandate of the Committee.

CONCLUSION

Petitioners respectfully urge the Court to grant the petition for writ of certiorari, summarily reverse the dissolution order of the three-judge court and direct the statutory court to proceed with the adjudication of the controversy. Should the Court consider directing plenary consideration of the issues presented, Petitioners respectfully urge that the Court accept for review in addition to the question raised in the order of dissolution of the three-judge court the serious and substantial question presented

by the challenge to the facial constitutionality of the mandate of the Committee as embodied in the Legislative Reorganization Act of 1946.

Respectfully submitted,

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APPENDICES

by the challenge to the facial constitutionality of the
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APPENDICES

APPENDIX A

Opinion of Court of Appeals Below

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1967

No. 21,382

DR. ALLEN M. KREBS and WALTER D. TEAGUE, III, on their own behalf and on behalf of all other persons similarly situated,

Appellants,

v.

JOHN M. ASHBROOK, JOHN H. BUCHANEN, JR., and DEL CLAWSON, *et al.*,

Appellees.

Appeal from the United States District Court for the District of Columbia.

Before:

PRETTYMAN, *Senior Circuit Judge,* and WRIGHT and ROBINSON, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof, and this court being in general agreement with the opinion filed by the District Court in this case, *Krebs* v. *Ashbrook*, D. D. C., 275 F. Supp. 111 (1967), it is

ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

PER CURIAM

Dated: May 14, 1968

APPENDIX B

Concurring Opinion of Senior Circuit Judge Prettyman

PRETTYMAN, *Senior Circuit Judge,* concurring: I concur in the judgment of the court, but I would go further and direct either the three-judge court or the single District Judge to dismiss the complaint. As I see it, no justiciable controversy is presented by the complaint. Appellants have not been asked any questions. They allege they are threatened by reason of their knowledge of the general reputation of the House Committee. The Supreme Court has passed on the point several times,[1] as has this court.[2]

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[1] I have in mind what the Supreme Court said in *Hutcheson* v. *United States,* 369 U. S. 599, 619 (1962): "Unless interrogation is met with a valid constitutional objection 'the scope of the power of [congressional] inquiry * * * is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.' *Barenblatt* v. *United States,* [360 U. S. 109], at 111 [1959]. And it is not until the question is asked that the interrogator can know whether it will be answered or will be met with some constitutional objection. To deny the Committee the right to ask the question would be to turn an 'option of refusal' into a 'prohibition of inquiry,' 8 Wigmore, Evidence (3d ed.) § 2268 * * *. Such a restriction upon congressional investigatory powers should not be countenanced."

And from another point of view see *Ashwander* v. *TVA,* 297 U. S. 288, 347-48 (Brandeis, J., concurring), and *Massachusetts* v. *Mellon,* 262 U. S. 447, 448 (1923). See also Jaffe, *Standing to Secure Judicial Review: Public Actions,* 74 HARV. L. REV. 1265 (1961), and Note, *The Supreme Court and Standing to Sue,* 34 N.Y.U. L. REV. 141 (1959).

[2] *Mins* v. *McCarthy,* 93 U. S. App. D. C. 220, 209 F. 2d 307 (1953); *Pauling* v. *Eastland,* 109 U. S. App. D. C. 342, 345, 288 F. 2d 126, 129, *cert. denied,* 364 U. S. 900 (1960): "The separation of powers principle is one of the basic concepts of the Constitution. The courts have no power of interference, unless and until some event, such as arrest, indictment or conviction brings an actual controversy into the sphere of judicial authority. The courts can-

Stamler v. *Willis*[3] is not apposite, because there the plaintiffs had been asked questions, had refused, and stood in immediate danger of prosecution.

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not interfere merely upon the petition of a person potentially liable to some such event." See also *Fischler* v. *McCarthy*, 119 F. Supp. 643 (S. D. N. Y. 1954); aff'd, 218 F. 2d 164 (2d Cir. 1954).

[3] 371 F. 2d 413 (7th Cir. 1966).

APPENDIX C

Opinion of Majority—District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2157-66

DR. ALLEN M. KREBS and WALTER D. TEAGUE III, on their own behalf and on behalf of all other persons similarly situated,

Plaintiffs,

—v.—

JOHN M. ASHBROOK, JOHN H. BUCHANAN, JR., DEL CLAWSON, JOE R. POOL, RICHARD H. ICHORD, WILLIAM M. TUCK, GEORGE F. SENNER, JR., CHARLES L. WELTNER, EDWIN E. WILLIS, individually and as Chairman and Members of the Committee on Un-American Activities of the United States House of Representatives, DAVID G. BRESS, United States Attorney for the District of Columbia,

*Defendants.**

OPINION

Robert L. Ackerly, of Washington, D. C., William M. Kunstler, of Washington, D. C., and Lawrence Speiser, of Washington, D. C., for plaintiffs.

* The Court takes judicial notice of the fact that the official position of several of the defendants named at the time this complaint was filed has been changed.

Harry Alexander, Joseph M. Hannon, Frank Q. Nebeker and Gil Zimmerman, Assistant United States Attorneys, for defendants.

Before BAZELON, Chief Circuit Judge, FAHY,* Circuit Judge, and CORCORAN, District Judge.

FAHY, Circuit Judge. In its early stages this case was thought to require the convening of a three-judge District Court under the mandate of 28 U. S. C. §2282,[1] since the complaint, in seeking injunctive relief against appellees, alleged that Rule XI of the House of Representatives, the charter of the House Committee on Un-American Activities, was enacted by the Legislative Reorganization Act of 1946, 60 Stat. 812, and was unconstitutional. The constitutional question being deemed not insubstantial, a three-judge District Court was convened under the terms of 28 U. S. C. §2284 which prescribes the procedure for and composition of a three-judge District Court required by Section 2282. At the outset this three-judge court requested memoranda on the issue whether "this case should proceed before this specially constituted three-judge court or be remanded to a single District Judge." Both parties promptly filed memoranda, but neither raised the question whether Rule XI was an "Act of Congress." Thereafter on April 14,

* Circuit Judge Fahy became Senior Circuit Judge April 13, 1967.

[1] Section 2282 provides:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

1967, defendants filed a "Supplement to Motion to Dismiss . . . ," urging that Rule XI is a "Rule of Procedure adopted by the House of Representatives (acting singly)." The close reexamination of the genesis and status of Rule XI, prompted by defendants' "Supplement," has led us to conclude that Rule XI is not an "Act of Congress" as that term is used in Section 2282, that the activities of defendants as to which injunctive relief is sought by plaintiffs have been and are conducted under authority of a rule of the House of Representatives rather than under the authority of an Act of Congress, and that, therefore, the case is not one that comes within the provisions of Section 2282.

Plaintiffs' Bill of Complaint alleges that the Legislative Reorganization Act of 1946 enacts *inter alia* Rule XI of the Rules of the House of Representatives, referred to as the charter of the Committee, and that, as thus enacted the Rule is void on its face, including its origin, the setting within which the Committee has operated in the past, and as the Rule is applied to plaintiffs, in that it violates the Constitution, in particular Article I, Section 9, Clause 3, and Article III, as well as in other respects set forth.

Title I of the Reorganization Act is the part of the Act pertinent to this case. It is entitled "Changes in Rules of Senate and House" after which follows the subtitle, "Rule-making Power of the Senate and House." The title then contains the following unusual provision:

> Sec. 101. The following sections of this title are enacted by the Congress:
>
> (a) As an exercise of the rule-making power of the Senate and the House of Representatives, respectively,

and as such they shall be considered as part of the rules of each House, respectively, or of that House to which they specifically apply; and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(b) With full recognition of the constitutional right of either House to change such rules (so far as relating to the procedure in such House) at any time, in the same manner and to the same extent as in the case of any other rule of such House. [60 Stat. 814]

A "Part 1" then provides the "Standing Rules of the Senate," including "Standing Committees of the Senate."

A "Part 2" provides "Rules of the House of Representatives," including "Standing Committees of the House of Representatives." Under the caption "Rule X," which is the first rule set forth, it is stated, "There shall be elected by the House, at the commencement of each Congress, the following standing committees": "17. Committee on Un-American Activities, to consist of nine members." Rule XI provides the "Powers and Duties of Committees." In due course under this Rule comes "Committee on Un-American Activities." Its powers and duties are there set forth as follows:

"(A) Un-American activities.

"(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda ac-

tivities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

"The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

"For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any members designated by any such chairman, and may be served by any person designated by any such chairman or member. [60 Stat. 828-29.]

The Legislative Reorganization Act of 1946 only restates the rules pertaining to the House Un-American Activities Committee. The Committee achieved its stand-

ing committee status and first received its charter, as it presently reads, in House Resolution 5, 79th Cong., 1st Sess., 91 Cong. Rec. 10, 15 (1945). See also *Watkins* v. *United States,* 354 U.S. 178, 201-03.

We particularly note that Title I is headed "Changes in Rules of Senate and House," and states that it is enacted by Congress "as an exercise of the rule-making power of the Senate and the House of Representatives, respectively, and as such they shall be considered as part of the rules of each House, respectively, or of that House to which they specifically apply," with recognition of the right of either House to change the rules relating to the procedure of such House, at any time or in the same manner and to the same extent as "in the case of any other rule of such House." This conforms with the provision of Article I, Section 5 of the Constitution: "Each House may determine the Rules of its Proceedings . . ." In contrast, Title II of the Act also bears upon the internal affairs of Congress, but makes no provision for amendment by either House and does not purport to be "an exercise of the rule-making power of the Senate and the House of Representatives, respectively." Its provisions are denominated "Statutory Provisions."[2]

While the House was sitting as a Committee of the Whole House to consider the 1946 Act, Congressman Monroney, the floor leader, stated:

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[2] Title II, which is designated "Miscellaneous," has three parts—"Part 1—Statutory Provisions Relating to Congressional Personnel," "Part 2—Statutory Provisions Relating to Committees of Congress," and "Part 3—Provisions Relating to Capitol and Pages." 60 Stat. 834.

> Mr. Chairman, I ask unanimous consent that the portions of the bill from line 12, page 5, to line 13, page 24, be considered as read and printed in the Record. That portion of the bill deals exclusively with the rules of the Senate over which the House exercises no real jurisdiction, and it would expedite consideration of the bill to treat it in this manner.

There was no objection to this procedure. 92 Cong. Rec. 10061-62. The Congressman also stated, "We are not touching the Senate rules, we are changing our rules. The Senate changes its rules at the same time." *Id.* at 10040.

Prior to the reading of Title I, Part 2 of the Bill before the Committee of the Whole House, Congressman Celler inquired:

> Would we by the provisions embodied in this bill have the right to change the rules of the next Congress despite the fact that this bill was passed by the Senate and the House?

Congressman Monroney responded,

> No. [*sic*] It specifically recognizes the right of either House to change its rules at any time. We are merely doing it jointly for the purpose of convenience and clarification. The rules can be changed by the new Congress or by this Congress at any time.

Id. at 10064.

It appears, therefore, that though acting jointly in the Reorganization Act each House, insofar as Title I is con-

cerned, was acting under its own authority to establish rules for the conduct of its own business.[3]

Thus these rules of the Reorganization Act would not appear to come within the meaning of an "Act of Congress" as that expression is used in 28 U.S.C. § 2282, in contrast with, *e.g.*, the "Federal Tort Claims Act," see footnote 3, *supra*. Section 2282 is not directed to the internal administrative procedures of the Senate or House governing, respectively, the conduct of its own business.

The disposition of the Supreme Court not to enlarge the scope of Section 2282 readily appears in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 152-55.[4] The Court rec-

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[3] The Legislative Reorganization Act of 1946 grew out of 18 months of preparation, study, and hearings by the Special Committee on the Reorganization of Congress, a joint committee of the House and Senate. 92 Cong. Rec. 10039. The reorganization of the committee system, Title I, is only a small portion of the Special Committee's proposal. The other parts of the proposal, which were also intended "to streamline" congressional operations, were adopted as an exercise of Congress' legislative authority. Title II of the Act is designated "Miscellaneous," see note 2; Title III is entitled "Regulation of Lobbying Act"; Title IV is entitled "Federal Tort Claims Act"; Title V is entitled "General Bridges Act"; and Title VI, the final title, is designated "Compensation and Retirement Pay of Members of Congress."

[4] The Supreme Court also has indicated some hesitation to read Section 2282 literally. The Court continued *Ex Parte Cogdell*, 342 U.S. 163, on its docket in order to permit the Court of Appeals for the District of Columbia Circuit, in which the case was also pending, to determine in the first instance whether "congressional enactments affecting only the District of Columbia" came within Section 2282. Subsequently the parties dismissed their appeal in the Court of Appeals. See, however, *Hobson* v. *Hansen*, 252 F. Supp. 4 (D.D.C.), and *Hobson* v. *Hansen*, 265 F. Supp. 902 (D.D.C.), in both of which the problem of applicability of Section 2282 was considered only in relation to the substantiality of the constitutional question, without reference to whether or not the operation of an Act of Congress was involved.

ognized that there was a formal prayer for an injunction in plaintiff's amended complaint, but on the basis of stipulations entered into to "govern the course of the trial" the Court found that neither the parties nor the judge contemplated injunctive relief. Compare *Idlewild Liquor Corp.* v. *Epstein,* 370 U.S. 713. Having thus disposed of the prayer for injunctive relief, the Court stated that the declaratory relief also requested in this case did not come within Section 2282. Moreover, the Court referred to Section 2282 as having been enacted—like Section 2281 which is applicable to an attack upon state legislation—"to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order," or, as stated elsewhere in the opinion, the putting out of operation of "an entire statutory scheme." 372 U.S. 154, 155.[5] The kinship between Sections 2281 and 2282 also appears from the Court's reference in *Kennedy* v. *Mendoza-Martinez* to *Phillips* v. *United States,* 312 U.S. 246, 250-51. In *Phillips* it is said:

> The history of § 266 [now § 2281] . . . , the narrowness of its original scope, the piece-meal explicit

[5] The complementary nature and legislative purpose of Sections 2281 and 2282 were reaffirmed in *Zemel* v. *Rusk,* 381 U.S. 1, 7 n. 4 where *Kennedy* v. *Mendoza-Martinez, supra,* is quoted at length. In *Zemel* the Court held a three-judge court was properly convened and stated,

> The convening of a three-judge court in this case surely coincides with the legislative policy underlying the passage of § 2282 . . . . Appellant in this case does not challenge merely a "single, unique exercise" of the Secretary's authority, cf. *Phillips* v. *United States,* supra, at 253. On the contrary, this suit seeks to "paralyze totally the operation of an entire regulatory scheme," indeed, a regulatory scheme designed and administered to promote the security of the Nation.

> amendments which were made to it . . . , the close construction given the section in obedience to Congressional policy . . . , combine to reveal § 266 not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the terms and to be applied as such.

Moreover, in *Bailey* v. *Patterson*, 369 U.S. 31, 33, it is said:

> We hold that three judges are similarly not required when, as here, prior decisions make frivolous any claim that a state statute [permitting segregation of interstate transportation facilities] on its face is not unconstitutional. . . . The reasons for convening an extraordinary court are inapplicable in such cases, for the policy behind the three-judge requirement—that a single judge ought not to be empowered to invalidate a state statute under a federal claim—does not apply. The three-judge requirement is a technical one to be narrowly construed, *Phillips* v. *United States*, 312 U.S. 246, 251. The statute comes into play only when an injunction is sought "upon th ground of the unconstitutionality" of a statute. There is no such ground when the constitutional issue present is essentially fictitious.

And in *Swift & Co.* v. *Wickham*, 382 U.S. 111, 124, 128-29 (footnote omitted):

> . . . [T]he admonition that § 2281 is to be viewed "not as a measure of broad social policy to be construed with great liberality, but as an enactment tech-

nical in the strict sense of the term and to be applied as such," *Phillips* v. *United States*, 312 U.S. 246, 251, should be kept in mind.

* * * * *

Although the number of three-judge determinations each year should not be exaggerated,[26] this Court's concern for efficient operation of the lower federal courts persuades us to return to the *Buder-Bransford-Case* rule, thereby conforming with the constrictive view of the three-judge jurisdiction which this Court has traditionally taken. *Ex parte Collins*, 277 U.S. 565; *Oklahoma Gas & Elec. Co.* v. *Oklahoma Packing Co.*, 292 U.S. 386; *Rorick* v. *Board of Commissioners*, 307 U.S. 208; *Phillips* v. *United States*, 312 U.S. 246.

And see *United States* v. *I.C.C.*, 337 U.S. 426, 443; *Ayrshire Corp.* v. *United States*, 331 U.S. 132, 136-37; *Darlington* v. *Federal Housing Administration*, 134 F. Supp. 337, 339 (E.D.S.C.), *rev'd on other grounds*, 352 U.S. 977.

Apart from the foregoing, yet fortifying the position there taken as to the inapplicability of Section 2282, House Rule XI, under which the Committee or Subcommittee functioned in the matters material to this case, was adopted as a Rule of the House, with a legal status which does not rest upon Title I of the Reorganization Act.[6] It is a Rule

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[6] Any decision as to the constitutionality of Rule XI we argue would be decisive on the constitutionality of the 1946 Act, but the Supreme Court has stated:

> Section 3 [now 2282] does not provide for a case where the validity of an Act of Congress is merely drawn in question, albeit that question be decided, but only for a case where there is an application for an interlocutory or permanent injunc-

of Procedure adopted by the House of Representatives (acting singly) on January 4, 1965. H. Res. 8, 89th Cong., 1st Sess., 111 Cong. Rec. 21, 25. This resolution reads:

> *Resolved,* That the Rules of the House of Representatives of the Eighty-eighth Congress, together with all applicable provisions of the Legislative Reorganization Act of 1946, as amended, be, and they are hereby adopted as the Rules of the House of Representatives of the Eighty-ninth Congress,

with certain amendments the substance of which is not here material.

To the extent that the House of Representatives of the Eighty-ninth Congress "adopted" the terms of the Reorganization Act of 1946, specifically the powers of the House Un-American Activities Committee, it did so as an exercise of the authority of the House to make its own rules. The Un-American Activities Committee existed prior to the 1946 Act, first as an ad hoc and then as a permanent committee pursuant to resolutions of the House of Rep-

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> tion to restrain the enforcement of an Act of Congress. . . . Had Congress intended the provision in § 3, for three judges and direct appeal, to apply whenever a question of the validity of an Act of Congress became involved, Congress would naturally have used the familiar phrase "drawn in question," as in the first section of the Act [now 28 U.S.C. 2403].

Garment Workers v. *Donnelly Co.,* 304 U.S. 243, 250, quoted in part in *Fleming* v. *Nestor,* 363 U.S. 603, 607, and *Pennsylvania Pub. Util. Comm'n* v. *Pennsylvania R. Co.,* 382 U.S. 281, 282.

Here, of course, plaintiffs seek to enjoin the Committee from acting under either Rule XI or the 1946 Act, but they are not entitled to the latter relief if the Committee was operating only under its Rule.

resentatives. Since 1946, the House of Representatives for each of the eleven Congresses has passed its own rules. Acting singly, the House has also amended rules which appear in the Legislative Reorganization Act.[7] These unicameral actions by the House demonstrate its consistent interpretation of the Act of 1946, that is, the House of Representatives for each Congress still creates its own committees.

Though the Committee has stated that its authority rests upon both the Act and the rules, such statement, understandable as it is, does not constitute an analysis of the legal situation. And it is not a position advanced by the House itself or by the Congress. Indeed, it is quite inconsistent with the practice of the House. Rule XLII, the last rule of the House, provides:

> . . . [T]he provisions of the Legislative Reorganization Act of 1946, as amended, shall govern the House in all cases to which they are applicable, and in which they are not inconsistent with the standing rules and orders of the House . . . .

Lewis Deschler, *Rules of the House of Representatives*, H.R. Doc. No. 619, 87th Cong., 2nd Sess., 499. See also H. Res. 5, 83d Cong., 1st Sess., 99 Cong. Rec. 15, 24, which for the first time incorporates the terms of the Act in Rule XLII. Moreover, with the exception of the Eighty-third Congress, each Congress since 1946 has explicitly adopted "all applicable provisions of the Legislative Re-

[7] *E.g.* H. Res. 8, 89th Cong., 1st Sess., 111 Cong. Rec. 21, 25, amending portions of Rule XI pertaining to the Committee on Rules and other provisions.

organization Act." This practice indicates that each incoming House of Representatives has considered itself to be writing on a clean slate, notwithstanding the Act of 1946.

Each house of Congress may, of course, amend its own rules without consulting the other body.[8] Such an amendment is clearly not an "Act of Congress" under Section 2282. No three-judge District Court could, therefore, have jurisdiction over an action to enjoin the enforcement, operation, or execution of such an amendment. It would be anomalous to hold that an action to enjoin conduct under some sections of the present rules of the House of Representatives is within the jurisdiction of a three-judge court solely because of the fact that they were restated in the Act of 1946, whereas an action involving a subsequently amended rule would not be within the purview of Section 2282.

It is also significant that the Supreme Court has in several opinions traced the authority of the Un-American Activities Committee to resolutions of the House rather than to the 1946 Act. In *Watkins* v. *United States,* 354 U.S. 178, 201-203, the history of the Committee is set forth, and at the latter page it is said (footnote omitted):

> On five occasions, at the beginning of sessions of Congress, it has made the authorizing resolution part of the rules of the House.[14]

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[8] See, *e.g.,* H. Res. 5, 88th Cong., 1st Sess. (amendment of House Rule X so as to enlarge the membership of the Committee on Rules); S. Res. 5, 86th Cong., 1st Sess. (amendment of Senate Rule XXII so as to provide for adoption of cloture by two-thirds of those Senators present and voting).

Antecedents in the text and the sources in footnote 44 clearly reveal that the "it" in the above sentence is the House of Representatives alone, not the Congress. In *Barenblatt* v. *United States,* 360 U.S. 109, 115 (footnote omitted, the Court refers to the challenge to "Rule XI of the House of Representatives, Eighty-third Congress, the charter of authority of the present Committee."[6] The footnote also shows that the "charter" was a House Resolution, nothing more. And see *Gojack* v. *United States,* 384 U.S. 702, 706-707, n. 4, including the sentence:

> It is the practice of the House to adopt its Rules—including the Rule which establishes the Un-American Activities Committee and defines the scope of its authority—at the beginning of each Congress. See, *e.g.,* 109 Cong. Rec. 14, 88th Cong., 1st Sess. (1963); 101 Cong. Rec. 11, 84th Cong., 1st Sess. (1955).

True it is that as a matter of policy when an injunction is sought there would seem to be good reason for a three-judge court to pass on a constitutional challenge to the authority of a congressional committee. But when Section 2282 was enacted there was no occasion for seeking to protect the functioning of such a committee. The problems lay elsewhere, until now. Section 2282 was directed to the problems as they existed, the putting out of operation of an Act of Congress. If a three-judge court also should as a matter of policy be required to strike down a rule of a House under which a House committee operates Congress should address its attention to this new problem.

It is quite true also, as we have suggested, see note 6, *supra,* that were Rule XI to be held unconstitutional such

a holding would undermine the constitutionality of the like provisions of the Reorganization Act of 1946 should they come under attack. But this would be because of the precedential authority of the holding. To come under Section 2282, the Act of Congress or operations under it must be the direct object of the injunction sought. *Flemming* v. *Nestor, supra.* It is the conduct of the defendants under House Rule XI that is the object of this suit. Even if authorized by the Reorganization Act, Rule XI does not depend upon that Act, for Resolution 8 of the House of Representatives of the Eighty-ninth Congress alone was the grant of authority under which its committees were to operate.

Having concluded the case does not require a statutory three-judge District Court, there remains the problem of what we should do. Were a unanimous decision on the merits reached by the three judges, respected authority suggests they should render the decision. *Swift & Co.* v. *Wickham,* 230 F. Supp. 398 (S.D.N.Y.). This has an advantage. An appeal from that decision could be filed both in the Supreme Court and alternatively in the Court of Appeals. If the Supreme Court should decide the case not to be one for a statutory three-judge District Court it would dismiss the appeal. Review would then be available under the alternative appeal in the Court of Appeals. *Swift & Co.* v. *Wickham,* 382 U.S. 111, 129. Or the Supreme Court could treat the appeal papers as an application to it for certiorari prior to Court of Appeals decision. *Turner* v. *City of Memphis,* 369 U.S. 350. But it is not necessary for the three judges to seek unanimity and to decide the case. In this jurisdiction the course heretofore

adopted, which we now follow, is to dissolve the statutory three-judge court and remit the case to the District Judge to whom it was first presented, for disposition by him. *Osage Tribe of Indians* v. *Ickes*, 45 F. Supp. 179, *aff'd*, 77 U.S. App. D.C. 114, 133 F.2d 47, *cert. denied*, 319 U.S. 750; *Marcello* v. *Kennedy*, 194 F. Supp. 748.

CHARLES FAHY
Senior Circuit Judge

HOWARD F. CORCORAN
District Judge

Dated: September 11, 1967

APPENDIX D
Dissent of Chief Judge David Bazelon

BAZELON, Chief Judge, dissenting: The majority concludes that the activities of the defendant are conducted under the authority of a rule of the House of Representatives rather than under the authority of an Act of Congress. I disagree. By incorporating Rule XI into the Legislative Reorganization Act of 1946, 60 Stat. 812, Congress established a dual authorization for the House Committee on Un-American Activities. The Committee itself has not hesitated to state that it derives its mandate from an Act of Congress as well as from rules of the House.[1] In my view, therefore, this case does involve an injunction to restrain enforcement of an Act of Congress and falls within the provisions of 28 U.S.C. 2282.[2] The fact that

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[1] See, *e.g.*, HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES, ANNUAL REPORT FOR THE YEAR 1961, 145, stating that the Committee "has a statutory basis in Public Law 601—the Legislative Reorganization Act of 1946—as well as in the Rules of the House of Representatives." The report also spoke of "the purpose of *Congress* in the creation of this committee" and of the "*congressional* mandate." *Ibid.* [Emphasis added.] See also HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES, ANNUAL REPORT FOR THE YEAR 1963, 123.

Every publication of the Committee begins with the recital that "The legislation under which the House Committee on Un-American Activities operates is Public Law 601, 79th Congress [1946]; 60 Stat. 812 . . . ."

[2] I think, therefore, that it is unnecessary to decide whether there may be circumstances in which a rule of the House or Senate could be regarded as an Act of Congress for purposes of § 2282. See *Methodist Fed'n for Social Action* v. *Eastland,* 141 F. Supp. 729 (D.D.C. 1956), where a three-judge court took jurisdiction to decide a case challenging the validity of a Senate Concurrent Resolution. See especially opinion of Wilkin, J., dissenting on other grounds, *id.* at 736.

plaintiffs are also trying to enjoin enforcement of a rule of the House does not render § 2282 inoperative.

The majority suggests that even if defendants' activities are conducted under the authority of the Legislative Reorganization Act, that statute is not the type of Act Congress had in mind when it required the convocation of a three-judge court. Section 2282, however, speaks of "any Act of Congress," and neither Congress nor the Supreme Court has provided us with sufficient guidance to carve out exceptions to it.

Accordingly, I dissent from my brethren's view that a three-judge court lacked jurisdiction in this case.

DAVID BAZELON
Chief Circuit Judge

APPENDIX E

Statement by Judge Howard F. Corcoran Delivered From the Bench on August 15, 1966

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Absent circumstances to which the court will allude, this court would be inclined to deny the petition for the convening of a 3-judge court on the grounds that no substantial constitutional issue is raised by the pleadings. This sentiment is based upon the express holding of the Supreme Court in Barenblatt, where it expressly upheld the constitutionality of Rule XI, promulgated pursuant to the Reorganization Act of 1946, and under which the committee since has been operating with the express approval of the Supreme Court.

Only recently, however, in Gojack v. U.S., the Supreme Court saw fit to accept the case for review under a writ of certiorari on certain questions among which several expressly directed to the constitutionality of the Reorganization Act of 1946 as applied to Rule XI of the Congress. As the court noted in the course of the oral argument today, the Supreme Court avoided the constitutional issue when the case was finally argued and so has cast no light upon the question involved if there is one. It has, however, given passing recognition to the problem.

As to whether a controversy between the parties exists, there is room for substantial difference of opinion as to when a controversy begins and when a person's constitutional rights are being affected.

The appellate courts seem more prone to find a controversy when there is possible—not necessarily probable—and certainly not actual—threat to the First Amendment

rights. This is illustrated by Reed Enterprises v. Corcoran, and Dombrowski v. Pfister.

Since this court is bound by the decisions of the appellate courts in the field, its discretion is limited and it must of necessity find the presence of a case and controversy in this instance where subpoenas have been issued and the witnesses are subject to process.

In view of the foregoing, this court is limited in its discretion and must of necessity order the convening of a three-judge court.

This opinion is not to be considered as any broader than the mere granting of a petition for a three-judge court. It is to be narrowly limited to the findings:

1. There is a case in controversy.
2. A not insubstantial issue has been raised.
3. A temporary restraining order will issue and the court will request the convention of a three-judge court.

APPENDIX F

Complaint

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[SAME TITLE]

COMPLAINT FOR INJUNCTIVE AND DECLARATORY JUDGMENT RELIEF

Plaintiffs, for the verified complaint allege as follows:

I—PARTIES

A) *Plaintiffs*

1. Plaintiff Dr. Allen M. Krebs is a citizen of the State of New York and of the United States. Dr. Krebs received a doctor of philosophy degree in Social Psychology from the University of Michigan. He has held teaching positions, instructor at the University of North Carolina, assistant study director, survey research center University of Michigan, as Assistant Professor of Sociology of the American University in Beirut, Lebanon and at Adelphi University in Garden City, New York. He is presently President of the Free University of New York, Inc., known as The Free School of N.Y., Inc. The Free University of New York is an educational institution dedicated to the encouragement of an atmosphere of intellectual freedom conducive to the development of ideas and concepts of dissent. It encourages intellectual confrontation and a clash

of ideas through a wide variety of courses, forums and seminars which challenge conformity and orthodoxy in many areas of American intellectual, cultural, political and economic life. The summer 1966 catalog of courses and seminars is attached hereto as Exhibit A and made a part hereof. More than a thousand students have participated in the educational activities of the Free University since its founding in 1965. Dr. Krebs is the President of the Free University and a member of its faculty teaching various courses in politics and sociology. During many of the courses and seminars offered at the Free University ideas and opinions sharply critical of the present foreign and domestic policies of the present Administration and in particular the conduct of the war in Vietnam have been frequently expressed by students and faculty. In addition ideas and opinions sharply critical of repressive legislation and conduct of organs of national government, including the Committee on Un-American Activities of the House of Representatives have been frequently expressed by students and faculty members. Many of the courses offered, including the courses offered by Plaintiff Dr. Krebs, express viewpoints sharply critical of social, political, cultural and economic aspects of present day American society and suggest for consideration by the students social, political and economic theories, ideas and concepts which postulate the necessity for a fundamental reorganization of American society. All of the activities of the Free University and the ideas and concepts advanced, examined and explored by its students and faculty are fully within the protection of the First Amendment to the Con-

stitution of the United States, and reflect the exercise of the fundamental rights of freedom of belief and thought, freedom of speech, assembly and the press, and freedom of academic inquiry and study all guaranteed by the First Amendment to the Constitution of the United States. Plaintiff Dr. Krebs has participated in many public meetings and gatherings protesting the present foreign policies of the government. He has been active and outspoken in expressing his dissent from the entire course of governmental policy in conducting the war in Vietnam. Plaintiff Dr. Krebs sues on his own behalf and on behalf of all the students and teachers of the Free University of New York and on behalf of all persons similarly situated who seek to exercise freely the rights guaranteed in the First Amendment to the Constitution of the United States to express and examine without fear of reprisal ideas and concepts critical of the current foreign and domestic policies of the Government.

2. Plaintiff Walter D. Teague, III is a citizen of the State of New York and of the United States. Plaintiff Teague is the Chairman of the United States Committee to Aid the National Liberation Front of South Vietnam. He is one of the founders of the Committee. The purpose of the Committee is to acquaint the public and in particular those many citizens who increasingly are concerned with the course of the war in Vietnam with the facts concerning the nature and existence of the National Liberation Front of South Vietnam in the expressed belief that the knowledge of the true facts concerning the National Liberation Front will assist materially in ending the war

in Vietnam and restoring peace in that country and in the world. The Committee seeks to obtain that objective through the utilization of the fundamental rights of free speech, press and assembly, and the right to petition the Government for a redress of grievances. The Committee publishes leaflets and pamphlets and sells and distributes literature and holds public meetings in the effort to bring before the American public its expressed views and opinions concerning the war in Vietnam. The Committee believes and expresses its belief through writing, speaking and public meetings that the present war efforts of the American government are unjustified and that the best interests of the American people lie in an immediate cease fire and the withdrawal of all American troops and bases in Vietnam in accordance with the strict implementation of the Geneva accords of 1954. The Committee believes and expresses through writing, speaking, and public meetings the belief that the National Liberation Front of South Vietnam is not the enemy of the American people and that the best interest of the American people lies in recognizing that the affairs of Vietnam must be settled by the people of Vietnam themselves. The Committee advocates and publicizes its advocacy that United States citizens should all demonstrate their non-enmity toward the people of the National Liberation Front by contributing to the medical relief of persons injured by the fighting in South Vietnam, advocating that individuals send monetary contributions for the purchase of medical supplies directly to representatives of the National Liberation Front Red Cross. All of the activities of the Committee are fully protected by the guarantees of the First Amendment to

the Constitution of the United States and reflect the exercise of the fundamental rights of free speech, press, assembly and the right to petition the Government for a redress of grievances.

Plaintiff Teague's full time activities are as Chairman of the Committee. He has participated in many public meetings and gatherings protesting the present foreign policies of the Government. He has been active and outspoken in expressing his dissent from the entire course of governmental policy in conducting the war in Vietnam. In addition Plaintiff Teague has been active in movements and organizations seeking the full implementation of the constitutional guarantees of freedom and equality for the Negro citizens of this country. Plaintiff Teague served three and one half years as an enlisted man in the Air Force of the United States and received an honorable discharge. Plaintiff Teague sues on his own behalf and on behalf of the Committee and on behalf of all persons similarly situated who seek to exercise freely the rights guaranteed in the First Amendment to the Constitution of the United States to express and advocate without reprisal ideas and opinions critical of the current foreign and domestic policies of the government.

B) *Defendants*

3. Defendant Edwin E. Willis is a citizen of the State of Louisiana. He is made a party individually and as Chairman of the Committee on Un-American Activities of the House of Representatives of the United States House of Representatives (hereafter "House Un-American Activities Committee"). Defendants Joe R. Pool, a citizen of

the State of Texas, Charles L. Weltner, a citizen of the State of Georgia, John M. Ashbrook, a citizen of the State of Ohio, Del Clawson, a citizen of the State of California, William M. Tuck, a citizen of the State of Virginia, Richard H. Ichord, a citizen of the State of Missouri, George F. Senner, Jr., a citizen of the State of Arizona, and John H. Buchanan, Jr., a citizen of the State of Alabama, are made parties individually and as members of the House Un-American Activities Committee.

II—Jurisdiction of the Court

4. The jurisdiction of the Court arises under 28 U.S.C. §§1331, 1332, 1343 (3) and (4), 2201, 2202, 2282, 2284; 42 U.S.C. §1983; and under the Constitution of the United States and in particular under Article I, Section 9, Clause 1, Article III, and the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Thirteenth, Fourteenth and Fifteenth Amendments thereto.

5. The amount in controversy, exclusive of interest and costs, exceeds $10,000.

III—Cause of Action

6. The defendants, each of them, acting in concert, under the color of an unconstitutional federal statute and Rule of the House of Representatives, on their face and as applied, together with other persons whose identities are presently unknown to plaintiffs, have undertaken, endeavored and planned to subject plaintiffs and other citizens similarly situated to the deprivation of rights, privi-

leges and immunities secured to them by the Constitution and laws of the United States.

7. Pursuant to this undertaking, endeavor and plan, the defendants have caused to be issued and served upon the plaintiffs certain subpoenas, copies of which are attached hereto as Exhibits 3 and 4, which purport to direct plaintiffs to appear before the House Committee on Un-American Activities in Washington, D.C., on August 16th, 1966, at 10:00 A.M.

8. The defendants have taken this action purportedly under the color of authority of an Act of Congress, the Legislative Reorganization Act of 1946, 60 Stat. 812 (U.S. Code Congress Service, 1946, p. 793), which enacts *inter alia* Rule XI of the Rules of the House of Representatives establishing the Charter of the House Committee on Un-American Activities. This statute, enacting Rule XI states in pertinent part:

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

9. Rule XI as enacted in this statute, establishing the charter of the House Committee on Un-American Activities is void and illegal on its face, including its origin and the setting within which the Committee has operated in the past, and as applied to these plaintiffs, in that it violates the Constitution of the United States and in particular Article I, Section 9, Clause 1, Article III, and the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Thirteenth, Fourteenth and Fifteenth Amendments thereof, for the following reasons, among others:

(a) Rule XI establishing the House Committee on Un-American Activities on its face and as applied to these plaintiffs violates the fundamental guarantees of freedom of speech, freedom of press, freedom of assembly, freedom of association, freedom of thought and belief, freedom of academic inquiry and the right of citizens to petition their Government for a redress of grievances, all of which are guaranteed by the First Amendment to the Constitution of the United States.

(b) Rule XI establishing the House Committee on Un-American Activities on its face is overly broad and vague in violation of the First Amendment to the Constitution of the United States. Its overbroad sweep inhibits and deters the exercise of the rights of freedom of speech, press, assembly and association in violation of the First Amendment. The dragnet sweep of the provisions of Rule XI and their overbreadth create a chilling effect upon the exercise of First Amendment rights by the people of the United States.

(c) Rule XI establishing the House Committee on Un-American Activities violates on its face and as applied the guarantees of due process of law contained in the Fifth Amendment to the Constitution of the United States in that its provisions are vague and indefinite and fail to meet the requirement of certainty in statutes which are enforced by criminal sanctions.

(d) Rule XI, establishing the House Committee on Un-American Activities purports to authorize such a sweeping, unlimited and all inclusive compulsory examination of witnesses in the protected areas of speech, press, association and assembly that it violates the procedural requirements of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

(e) The delegation of authority by the Congress to the House Committee on Un-American Activities, attempted in Rule XI, is so vague, ambiguous and uncertain that it cannot support or authorize investigations by that Committee which may affect or deter citizens of the United States in their exercise of the rights of freedom of speech, press, assembly and association.

(f) Rule XI establishing the House Committee on Un-American Activities violates on its face and as applied the fundamental right of American citizens to the privacy of their political beliefs, opinions and associations guaranteed by the First, Fourth, Ninth and Tenth Amendments to the Constitution of the United States.

(g) Rule XI establishing the House Committee on Un-American Activities both on its face and as evidenced by

its origin and the setting within which the Committee has operated in the past, purports to establish a general authority in the House Committee publicly to expose the private affairs of citizens without justification in terms of any legitimate legislative or investigatory function of Congress, all in violation of the Constitution of the United States and beyond and in excess of any powers granted to the Congress by the Constitution.

(h) Rule XI establishing the House Committee on Un-American Activities purports to establish the creation of a government mechanism with the sole purpose and objective of forcing public disclosure of beliefs, opinions, expressions, and association of private citizens which may be unorthodox or unpopular, resulting in and creating and stimulating public stigma, scorn and obloquy, all beyond any powers granted to the Congress by the Constitution and in violation of express constitutional prohibitions upon the Congress contained in the First, Ninth and Tenth Amendments to the Constitution.

(i) Rule XI, establishing the House Committee on Un-American Activities, both on its face and as applied purports to sanction a usurpation of the functions of executive and judicial branches of the national government in open violation of the fundamental principle of separation of powers which underlies the Constitution of the United States.

(j) Rule XI, establishing the House Committee on Un-American Activities, both on its face and as applied violates the prohibition against Bills of Attainder set forth in Article I, Section 9, Clause 1 of the Constitution of the United

States in that it purports to authorize and sanction the imposition of legislative punishment.

(k) Rule XI, establishing the House Committee on Un-American Activities, on its face and as applied violates Article III of the Constitution of the United States vesting the Judicial Power of the United States in the courts of the United States in that it purports to authorize and sanction the establishment of a legislative court to try, condemn and punish citizens for the exercise of rights otherwise guaranteed to them by the Sixth and other amendments of the Constitution of the United States.

10. The actions and threatened actions of the defendants taken under color of this unconstitutional and void Act of Congress have been taken and will be taken solely for the purpose of embarrassing, harassing and intimidating the plaintiffs and hundreds of thousands, if not millions, of American citizens and deterring and discouraging the plaintiffs and these hundreds of thousands of citizens from the immediate exercise of rights, privileges and immunities secured to them by the Constitution of the United States and in particular the rights of freedom of speech, press and association and the fundamental constitutional right of American citizens to dissent from the domestic and foreign policies of their government. The defendants seek to obtain these objectives by causing to be held up to public obloquy and scorn all citizens who resist or refuse to cooperate with defendants' unconstitutional conduct or who question defendants' motives or the propriety of defendants' procedures, and to embarrass, punish and deter persons whose political, economic, social, philosophical and

other views, ideas and beliefs do not coincide with the defendants', and in particular to punish and deter those citizens who have expressed views dissenting from the policies of the present administration in conducting the war in Vietnam. The defendants and each of them know full well that there is no legitimate legislative purpose underlying threatened compulsory investigation into plaintiffs' exercise of First Amendment rights and that the real purpose of the threatened compulsory investigations under color of this unconstitutional statute is to deter and intimidate American citizens from exercising in the open market place of ideas the basic right of all citizens under the Constitution to dissent vigorously from the present policies of their government and in particular the conduct of the war in Vietnam.

(a) The purported subpoenas issued to the plaintiffs, and the hearings to be convened by the defendants on August 16, 1966, are illegal and void in that defendants have violated the Rules of Procedure of their own Committee, and in particular Rule 26(m) and Rule XVI thereof, which provide as follows:

> "(m) If the committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, it shall—
>
> (1) receive such evidence or testimony in executive session;"
>
> "XVI. No Member of the Committee or staff shall make public the name of any witness subpoenaed before the Committee or Subcommittee prior to the date of his appearance."

(b) In violation of Rule 23(m), said subpoenas are returnable at a place which is open to the general public, despite the fact that the defendants have informed plaintiff Dr. Krebs that they have received so-called "derogatory" information concerning him. See letter of August 12th, 1966, attached hereto as Exhibit D.

(c) In violation of Rule XVI of defendants' own Committee, set forth above, the names of plaintiffs and other citizens subpoenaed by defendants under color of this unconstitutional statute were released by the defendants, their agents or employees and by persons acting in concert with them, whose identity is presently to the plaintiffs unknown, to certain public news media, including in particular newspapers in San Francisco, California which resulted in the publication of plaintiffs' names and those of other persons similarly subpoenaed in clear violation of the rules of defendants' own Committee. Copies of these newspaper articles are attached hereto as Exhibit E. This flagrant and open violation of the rules of the Committee by the defendants and their agents tenders the subpoenas issued to plaintiffs null and void and of no legal effect under the most recent binding rulings of the Supreme Court of the United States, in particular *Yellin* v. *United States,* 374 U.S. 109 (1963). The defendants full well know this and nevertheless threaten to proceed with their compulsory investigation into plaintiffs' First Amendment activities because their objectives are not and cannot be to conduct legitimate Congressional investigations but to utilize their purported power under the unconstitutional mandate of Rule XI to embarrass, deter and intimidate plaintiffs and countless

thousands of other citizens from exercising the historic and fundamental First Amendment right of public dissent—an objective unrelated to any legitimate constitutional power of the Congress of the United States.

12. Furthermore the defendants and each of them, threaten and continue to threaten to utilize the criminal statutes, in particular the criminal sanctions of Title 2 U.S.C., Sec. 192 to enforce against plaintiffs their illegal and void compulsory investigations into plaintiffs' exercise of First Amendment rights. Defendants threaten and continue to threaten to cause to be instituted against plaintiffs criminal proceedings under Title 2 U.S.C. Sec. 192 if plaintiffs refuse to submit to defendants' threatened unconstitutional and void investigations into these exercise of First Amendment rights. These criminal proceedings which defendants imminently threaten to cause to be invoked against plaintiffs will be instituted without any hope of ultimate success but only to discourage the plaintiffs exercise of rights guaranteed to them under the Constitution of the United States.

13. Unless this Court restrains the operation and enforcement of the void, invalid and unconstitutional Act of Congress which enacts Rule XI of the House Committee on Un-American activities and restrains the threatened criminal proceedings under Title 2 U.S.C. Sec. 192, plaintiffs, and members of the plaintiff classes will suffer serious, immediate and irreparable injury in that:

(a) The threatened compulsory investigation into plaintiffs' exercise of First Amendment rights under color of this unconstitutional and void Act of Congress and pur-

suant to these void and illegal subpoenas and the threatened criminal proceedings will, unless restrained by this Court, result in immediate and irreparable injury to fundamental constitutional rights guaranteed to these plaintiffs and hundreds of thousands of citizens similarly situated in that the threatened compulsory investigations will immediately have the effect of deterring plaintiffs, the classes of citizens they represent and countless other citizens from exercising fundamental rights of free speech, press, assembly, association, the right to petition for redress of grievances and in particular the fundamental right to dissent from the domestic and foreign policies of their government. Unless this Court grants the relief prayed for, substantial loss and impairment of freedom of expression will occur if plaintiffs are required to await the culmination of the inevitably long drawn out threatened criminal proceedings under Title 2 U.S.C. Sec. 192 and ultimate review by the Supreme Court of the United States.

(b) The threatened compulsory investigation into plaintiffs' exercise of First Amendment rights and the threatened criminal proceedings, unless restrained by this Court, will have an immediate and irreparable chilling effect upon the exercise of fundamental First Amendment rights unaffected by the prospects of the success or failure of the threatened criminal proceedings under Title 2 U.S.C. Sec. 172. The threatened compulsory investigation under color of this void and unconstitutional statute will have an immediate and irreparable chilling effect upon the exercise of basic First Amendment freedoms, including the historic and traditional right of Americans to dissent from

the domestic and foreign policies of their government, by countless hundreds of thousands of American citizens who will be deterred from exercising these rights. This creates a threat of immediate and irreparable injury to the fundamental interests of the Nation, since free expression—of transcendent value to all society and not merely to those exercising their rights—will be the victim.

(c) The threatened compulsory investigation into plaintiffs' exercise of First Amendment rights, and the threatened criminal proceedings, unless restrained by this Court will result in immediate and irreparable injury to the right of the plaintiffs and all other citizens similarly situated to the freedom of academic inquiry and study guaranteed by the First Amendment, in that the plaintiffs, members of the plaintiff classes and countless numbers of other citizens will be deterred, frightened and intimidated from engaging in the study, examination and consideration of ideas and concepts critical of social, political, cultural, and economic aspects of present day American society including the study, examination and consideration of ideas and concepts critical of the current foreign and domestic policies of the government. Unless the threatened unconstitutional acts of the defendants are restrained, thousands of students and teachers and citizens generally throughout the country will be intimidated and deterred from exploring, examining and considering ideas and theories which criticize and challenge established concepts in every area of American society. The chilling effect upon the free exercise of these fundamental First Amendment rights of open and unrestricted academic inquiry and study creates an immediate

and imminent threat to the most valuable interests of the entire Nation, in that the free and unrestricted search for truth which is the essential precondition for the functioning of a democratic society will be seriously limited and undermined.

(d) The threatened compulsory investigation into plaintiffs' exercise of First Amendment rights, and the threatened criminal proceedings, unless restrained by this Court will result in serious and irreparable injury to the right of plaintiffs and all American citizens to exercise the freedom of assembly and association protected by the First Amendment in that many citizens will be deterred, frightened and intimidated from joining or associating themselves with organizations, committees or schools or other associations plaintiffs are associated with or other organizations and associations which hold views or conduct activities in whole or in part similar to those with which these plaintiffs are associated. In particular unless the threatened unconstitutional acts of defendants are restrained by this Court, many citizens will be deterred from associating themselves with organizations or associations of citizens expressing views critical of the present policies of the government including expressions of dissent from the conduct of the war in Vietnam.

(e) The threatened compulsory investigation into plaintiffs' exercise of First Amendment rights, as well as the threatened criminal proceedings, unless restrained by this Court, will result in a serious and substantial, clear, present and imminent threat to the national interest and security in that the widespread resultant chilling effect upon

the fundamental right of American citizens to dissent from the policies of the present administration in pursuing the war in Vietnam, through the exercise of First Amendment liberties, will have a grave effect upon the fundamental right of American citizens to participate in the decisional processes which affect the destinies of the Nation.

14. Plaintiffs have no adequate remedy at law.

15. No previous application for the relief sought herein has been made to this or any other Court.

WHEREFORE, plaintiffs pray for the following relief:

1) that pursuant to Title 28, U.S.C. 2282 and 2784 a three-judge federal district court be immediately convened to hear and determine this proceeding;

2) that a permanent injunction issue:

(a) restraining the defendants and each of them, their agents, employees and attorneys, and all others acting in concert with them, and their successors, from the enforcement, operation, or execution in any way whatever of Rule XI, of the Rules of the House of Representatives establishing the Committee on Un-American Activities of the House of Representatives and the Legislative Reorganization Act of 1946, 60 Stat. 812, insofar as that Act incorporates and sets forth Rule XI, and

(b) restraining the defendants and each of them, their agents, employees and attorneys, and all others acting in concert with them, and their successors, from impeding,

intimidating, hindering, and preventing plaintiffs from exercising the rights, privileges, and immunities guaranteed to them by the Constitution and laws of the United States; and

(c) restraining defendants and each of them, their agents, employees, and attorneys, and all others acting in concert with them, and their successors from attempting to institute or from instituting criminal proceedings pursuant to Title 2 U.S.C. Sec. 192 against the plaintiffs in an effort to enforce the subpoenas issued to the plaintiffs by the defendants purportedly requiring their attendance and testimony before the House Committee on Un-American Activities on August 16, 1966.

3) That a declaratory judgment issue declaring that Rule XI of the Rules of the House of Representatives establishing the Committee on Un-American Activities of the House of Representatives and the Legislative Reorganization Act of 1946, 60 Stat. 812, insofar as it incorporates and sets forth Rule XI violate on their face and as applied the Constitution of the United States and are therefore null, void and of no effect.

4) And that pending the hearing and determination of the prayers for permanent relief the Court enter an interlocutory injunction restraining the defendants, their agents, employees and attorneys, and all others acting in concert with them from

(1) attempting in any way to enforce the subpoenas issued by the defendants to the plaintiffs purporting

to require their attendance and testimony before the House Committee on Un-American Activities and

(2) from attempting to institute or from instituting criminal proceedings pursuant to Title 2 U.S.C. Sec. 192 against the plaintiffs in an effort to enforce the subpoenas issued to the plaintiffs by the defendants purportedly requiring their attendance and testimony before the House Committee on Un-American Activities on August 16, 1966.

5) And for such other relief as may seem to this Court to be appropriate.

Respectfully submitted,

(Signed by all attorneys of record.)

APPENDIX G

Supplemental Complaint

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[SAME TITLE]

Plaintiffs supplement their complaint for injunctive and declaratory judgment relief herein by alleging in addition to all of the allegations set forth in the complaint the following which have occurred since the date of the said complaint:

16. On August 16th and 17th, 1966, plaintiffs, as required by the terms of defendants' subpoenas, attended the hearing, denominated by defendants as "investigative". The "investigative" hearing of the Committee continued through August 18th and August 19th, 1966. The transcript of said hearing is made a part hereof, and a copy is attached hereto and made a part hereof and marked as Exhibit A.

17. The application of Rule XI to plaintiffs and the class they represent by the defendants' conduct of said hearing violated fundamental guarantees of freedom of speech, freedom of the press, freedom of assembly, freedom of association, freedom of thought and belief, freedom of academic inquiry and the right of citizens to petition their govern-

ment for a redress of grievances in that during the course of said hearing, among other things, defendants inquired of and sought to elicit testimony from both "friendly" and "unfriendly" witnesses as to:

(a) the content, production, financial support, publication, sponsorship, and distribution of various publications of a political nature, and

(b) the content, production, distribution and exhibition of certain political films; and

(c) the creation, conduct, curriculum, administration, financial support and personnel of the Free University of New York; and

(d) the political aims, activities and personnel of numerous persons and associations of persons such as the Vietnam Day Committee and the May 2nd Movement; and

(e) the political content and public forum of speeches, peaceful demonstrations, and other activities delivered and conducted by persons and groups exercising their protected fundamental rights to make known their opposition to the curernt foreign policy of the Government in Vietnam; and

the defendants in making such inquiries and eliciting such testimony were not engaged in furthering any legislative purpose, but instead were directly harassing and intimidating the persons and groups named, and were attempting thereby to punish and deter the expression of political

views advocating a change in the Government's foreign policy; and the defendants were furthermore attempting to discourage and deter other persons from freely expressing themselves, peacefully demonstrating and freely associating and organizing with others in order to secure a change of the Government's foreign policy.

18. The application of Rule XI to plaintiffs and the class they represent, by the defendants' conduct of said hearing inhibited, deterred and created a chilling effect upon the exercise of the rights of freedom of speech, press and association in that, during the course of said hearing defendants inquired into among other areas, the teachings, programs, finances, goals, publications, peaceful demonstrations and petitions of organizations having aims of ending the war in Vietnam, for the purpose of using such information to imply or say that such advocacy and activities were disloyal, foreign-inspired and controlled, gave aid and comfort to the enemies of the United States, was in all respects despicable and opprobious to the Government and to all right-thinking people, and for the purpose of exposing such persons and groups involved in such advocacy and peaceful activities so that they could be condemned by public obloquy and thereby punished for their advocacy and peaceful activities.

19. The application of Rule XI to plaintiffs and the class they represent by the defendant's conduct of said hearing demonstrated the vague and indefinite terms of the Rule and its failure to meet the requirement of certainty in statutes which are enforced by criminal sanctions in

that, during the course of said hearing, among other things, witneses were unable to determine in advance whether questions addressed to them were within or without the Committee's statutory mandate because of its imprecise terms, such as "subversive," "un-American" and "propaganda."

20. The application of Rule XI to plaintiffs and the class they represent by the defendant's conduct of said hearing violated the fundamental right of American citizens to the privacy of their political beliefs, opinions and associations guaranteed by the First, Fourth, Ninth and Tenth Amendments, in that, in preparation for and during the course of said hearing, among other things defendants subponeaed the membership lists of at least six student political organizations from the University of Michigan and the University of California, overruled a motion to suppress these lists, and interrogated one "hostile" witness concerning the appearance of his name and signature on one such list. Defendants threaten to make public these lists either as part of the public record of this hearing, or by other means, and plan to utilize said lists for non-legislative purposes, and will do so in order that those whose names are on the lists will be publicly exposed to their irreparable harm and in order that students on campuses throughout the United States will be deterred from freely associating and organizing with others in opposition to the Government's present war policy in Vietnam because of the possibility of becoming listed in the files of the "Un-American Activities" Committee at some future date as a result of some subsequent hearing and because of the likelihood of being subpoenaed to explain such membership.

21. The application of Rule XI to plaintiffs and the class they represent by the defendants' conduct of said hearing demonstrated the lack of any legitimate legislative function of Congress in that the private affairs of citizens were exposed for no purpose except exposure by, among other things defendants

(a) inquiring into the real identities of writers who published under pen names; and

(b) inquiring into the relationship of attorneys with their clients in connection with the operation of the Vietnam Day Committee; and

(c) eliciting testimony from witnesses friendly to the Committee concerning opinions expressed by others to such witnesses, the names of such persons, and the names of persons associated with them.

22. The application of Rule XI to plaintiffs and the class they represent by the defendants' conduct of said hearing violated the First, Ninth and Tenth Amendments to the Constitution by forcing the public disclosure of beliefs, opinions, expressions, and associations of private individuals which may be unorthodox or unpopular for the purpose of creating and stimulating public stigma, scorn and obloquy in that before and during the hearings, among other things,

(a) public disclosure from witnesses as to their fundamental political philosophy as well as their position on current political questions was compelled; and

(b) public disclosure of political beliefs expressed in private meetings, correspondence, classrooms, faculty

meetings and personal conversation was similarly compelled.

23. The application of Rule XI to plaintiffs and the class they represent by the defendants' conduct of said hearing violated the fundamental principle of separation of powers and usurped the functions of the executive and judicial branches of the government in that, among other things,

(a) defendants summoned plaintiffs to a hearing which had no legislative purpose, because they were summoned to an "investigative" and not a "legislative" hearing. Said "investigative" hearing was intended to, and did in fact, usurp the executive function of police inquiry and the judicial function of public trial; and

(b) defendant Pool candidly acknowledged that the first three and one-half days of these proceedings lacked any legislative or other legitimate purpose by

(i) his opening statement in which he said, ". . . this is not a legislative hearing; that is, it is not a hearing to receive views or opinions on statutes within the Committee's jurisdiction or the bills pending before it which are mentioned in the resolution.", and by

(ii) his further statement that the "investigative" hearing was being held not to further a legislative purpose but for the purpose of exposure and in the exercise of the Committee's "pervasive authority to investigate Communist activities."; and by

(iii) his further statement that defendants were investigating "Communist propaganda activities . . . and travel and any other activities" and the "extent of Communist or subversive influence" connected to those persons and groups advocating a change in the Government's war policy in Vietnam.; and by

(iv) his statement after three and one-half days of "investigative" hearings that the "legislative phase" of the hearings would thereafter commence.

(c) defendants serving on the sub-committee, by their conduct and participation, adopted the dichotomy of function expressed in the chairman's remarks. Though defendants sought sometimes to justify the conduct of the first three and one-half days of these hearings as consisting of necessary investigation of facts to provide a predicate for legislation, their conduct of those hearings demonstrated a total disregard of the distinction between facts relevant to subjects on which Congress may validly legislate and limitless roaming into the ways in which individuals have exercised rights protected by the First Amendment. In these three and one-half days defendants produced a record that is essentially barren of facts that might bear upon or be pertinent to any constitutionally valid purposes of the bills purportedly under consideration.

24. The application of Rule XI to plaintiffs and the class they represent by the defendants' conduct of said hearing violated the fundamental principle of separation of powers

and usurped the functions of the executive and judicial branches of the government, violated the prohibition against Bills of Attainder and imposed legislative punishment, violated the Fifth Amendment's guarantee of due process of law, held up to public obloquy and scorn all who resist or refuse to cooperate with defendants' unconstitutional conduct, and sought to punish and deter from public expression of their views citizens who dissent from policies of the Government in conducting the war in Vietnam, and violated Article III of the Constitution of the United States by defendants' constituting themselves a legislative court, in that among other things,

(a) plaintiffs, and the class they represent, were deliberately held up to public ridicule, scorn and obloquy; and

(b) plaintiffs and others who share their belief that American policy in Vietnam is not above criticism were publicly characterized by defendants as disloyal and scarred with the brand of other harsh epithets;

(c) the names, addresses and professional connections of plaintiffs and others sharing their opinions were made public for the purpose of making their identities and whereabouts known to persons among the public who would harass and annoy them and subject them to scorn, humiliation and to social, professional and economic punishment;

(d) defendants concluded and announced as "findings" that plaintiffs and others were foreign-controlled subversive persons, disloyal to their nation and worthy of scorn and contempt; and

(e) defendants pronounced judgment on plaintiffs, the class they represent, and on all the hostile witnesses subpoenaed, as "hard-core revolutionary Communists" acting on behalf of foreign interests; and

(f) defendants repeatedly cajoled various witnesses to object to particular questions put to them, on the ground that the answers might tend to incriminate them, in the face of clear indications from the same witnesses that they had no intention of so objecting or that they intended them to object only on other and quite different grounds; and defendants also offered witnesses gratuitous legal advice that the self-incrimination objection was the only objection that would protect them from contempt citation and prosecution, all in order to subject these witnesses to further punishment by way of public defamation and degradation, thereby intending to create and creating in the minds of the public the false belief that the witnesses, the plaintiffs and those who oppose present American policy in Vietnam are criminals and deserving of public condemnation; and

(g) defendants conducted a trial on the issue of plaintiffs' loyalty with testimony for the prosecution having been prepared in advance and with defendants' attorney Nittle acting as a prosecutor, examining on direct examination prosecution witnesses previously prepared who were not permitted to be cross-examined, and then compelling persons in the class represented by plaintiffs to deny, refute or explain away charges by requiring them to submit to cross-examination without prior direct examination; and

(h) defendants denied, by agreement arrived at prior to the hearings, all motions made or attempted to be made by counsel for plaintiffs and other witnesses directed toward attempting to conform the acts of defendants to the requirements of the Constitution; and

(i) defendant Pool, intending thereby to convey his quasi-judicial conclusion that plaintiffs and others who oppose American policy in Vietnam are dedicated to violence and illegal acts, twice publicly advised a witness friendly to defendants to report any threats he might receive and warned all present of laws punishing such threats, although he knew no threats had been made and had no reason to believe any would be made.

25. The defendants have sought, by the conduct described herein, to punish and deter from public expression of their views, persons who dissent from the policies of the Government in conducting the war in Vietnam.

26. The defendants have caused to be held up to public obloquy and scorn all citizens who resist or refuse to cooperate with defendants' unconstitutional conduct by, among other things, their conduct described herein.

27. Defendants threaten, and claim the power and authority, to recall these plaintiffs and the witnesses called with them and others, to repeat and continue their use of the purported authority granted to them by said Rule XI to deprive plaintiffs and the members of the class they represent of constitutionally protected rights in the manner and with the effects herein alleged. In particular, the de-

fendants threaten to hold further "investigative" hearings into the exercise of the rights of free speech, press, assembly, association and petition by persons who dissent from the Government's policy with respect to the war in Vietnam. Defendants have asserted that these rights can be and should be so limited and that defendants intend to use the alleged power of Rule XI to do so. Defendants will conduct such additional hearings to the irreparable injury of plaintiffs and the class they represent unless the relief prayed for herein be granted.

28. The application of Rule XI to plaintiffs and the class they represent by the defendants' conduct of said hearing violated fundamental guarantees of due process of law under the Fifth Amendment, and of the right to counsel under the Sixth Amendment, in that, among other things,

(a) defendants, in violation of their own rules and without lawful or other reasonable excuse, caused one of plaintiffs' counsel to be physically lifted from his feet when he was making a legal motion to preserve plaintiffs' rights and caused said counsel to be ejected from the Committee room in a hammer-lock, strangle-hold grip of several United States marshals; and

(b) defendants deprived plaintiffs and all witnesses subpoenaed of the right to counsel by their conduct of the hearing and their treatment of counsel, including, among other things, denying the right to cross-examine accusatory witnesses; refusing to hear arguments upon points of law and motions, having determined in advance the disposition of such motions or objections it

raised; refusing inspection of executive session testimony in the nature of grand jury minutes; and treating counsel discourteously and violently; and

(c) defendants, by causing the brutal ejection of plaintiffs' counsel intended to and did in fact create in the minds of other counsel, witnesses, and the general public a fear of being subjected to immediate physical reprisal for any legal and orderly action taken in opposition to the Committee's mandate and investigatory operations;

(d) the ejection of one of plaintiffs' counsel was intended by defendants to intimidate other counsel and did in fact cause all other counsel to withdraw. Thereupon plaintiffs advised defendants that they could not and would not remain without counsel and accordingly withdrew.

29. During the course of the hearings, several witnesses refused upon a variety of Constitutional grounds, including those upon which this action is brought, to answer defendants' questions although specifically directed to do so.

30. Defendants have threatened to utilize criminal sanctions to hold plaintiffs and other witnesses in contempt for their refusal to comply with defendants' illegal and void compulsory investigations into plaintiffs' exercise of First Amendment rights, in that, among other things,

(a) defendants, during the course of said hearings specifically threatened particular witnesses and witnesses in general that they intended to enforce Rule XI by

initiating criminal contempt prosecutions against witnesses who failed to cooperate fully with the Committee's compulsory interrogation;

(b) after plaintiffs' announcement on August 17th to the Committee that they would no longer participate in the hearing because of their inability to utilize counsel of their own choice, and for the sole purpose of recording their default as a predicate for a subsequent criminal prosecution, plaintiffs' names were called by the Committee three times each upon two occasions;

(c) thereafter, defendant Ichord elicited testimony from Witness McCoomb for the record that the person known to McCoomb as plaintiff Kreos was the person who had announced his withdrawal;

(d) on information and belief, defendants have caused to be circulated in national news media their conclusions that although plaintiffs' action constituted contumacious conduct in violation of Title 2 U.S.C., Sec. 192, and at the present moment defendants' sole purpose in not having had already taken action to cause the institution of criminal proceedings against plaintiffs is to obtain the dismissal of the complaint herein, and that the defendants have every present intention to cause plaintiffs to be immediately criminally prosecuted for contempt should the complaint herein be dismissed.

31. Unless defendants are restrained by this Court from doing so, they will proceed with the citation, indictment and prosecution of plaintiffs and others for contempt, and

plaintiffs and such others will be forced, to their irreparable damage with respect to reputation and emotional strain, to defend themselves against such prosecution which will ultimately, following a gruelling series of trial and appeals, result in their vindication. Moreover, this will result not only in harassment, expense, shame and obloquy to plaintiffs by their being forced to defend themselves against criminal proceedings instituted without any hope of ultimate success, but will also result in serious, immediate and irreparable injury to the free exercise of the fundamental rights of these plaintiffs and all American citizens, to free speech, press, assembly, association and, in particular, to the fundamental right to dissent from the domestic and foreign policies of the Government, all guaranteed by the First Amendment to the Constitution.

32. Serious, immediate and irreparable injuries to fundamental freedoms resulting in a substantial loss and impairment of freedom of expression, have occurred, and will continue to occur, if plaintiffs are forced to await the culmination of the threatened inevitably long drawn out criminal proceedings and ultimate review by the Supreme Court. This is because the presently threatened criminal proceedings have had and will continue to have, unless restrained by this Court, an immediate and irreparable chilling effect upon the exercise of these basic First Amendment freedoms by these plaintiffs, the class they represent, and hundreds of thousands, if not millions of other American citizens. This chilling effect will occur unaffected by the prospects of the success or failure of the threatened proceedings.

33. As a result of these hearings, unless the relief prayed for be granted, plaintiffs and millions of other persons potentially subject to the abuses of defendants, set forth in the complaint as herein supplemented, and those associated with or inclined to be associated with them, will be deterred from freely expressing their thoughts and beliefs, from associating and assembling for common purposes, from freely petitioning their government for redress of grievances; and, as a consequence, the entire nation shall continue to suffer from the pall and chill on the exercise of First Amendment rights which is created by the mandate of Rule XI and the exercise of powers thereunder by the defendants, and their successors.

34. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray for the following relief:

1) all the preliminary and permanent injunctive relief and declaratory relief prayed for in the original complaint be granted; and

2) that in addition a permanent injunction issue restraining the defendants and each of them, their agents, employees and attorneys, and all others acting in concert with them, and their successors from using in any manner whatsoever the membership lists subpoenaed by defendants and that defendants be ordered to return all such lists and any copies thereof to their rightful owners;

3) and that pending the hearing and determination of the prayers for permanent relief the Court enter an interlocutory injunction restraining the defendants and each

of them, their agents, employees and attorneys, and all others acting in concert with them, and their successors from using in any manner whatsoever the membership lists subpoenaed by defendants and that defendants be ordered to return all such lists and any copies thereof to their rightful owners;

4) and for such other relief as may seem to this Court to be appropriate.

Respectfully submitted,

(Signed by all attorneys of record)

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325-451—68

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 633

DR. ALLEN M. KREBS AND WALTER D. TEAGUE, III,
PETITIONERS

v.

JOHN M. ASHBROOK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the Court of Appeals and separate concurring opinion (Pet. 1a–4a) are not yet reported. The opinion of the district court is reported at 275 F. Supp 111 (Pet. 5a–23a). The district court's original request for the convening of a three-judge district court is annexed to the petition (Pet. 24a–25a).

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1968. Petitioners' timely petition for rehearing was denied July 12, 1968. The petition for certiorari was filed on October 10, 1968. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULE INVOLVED

The authority under which the House Committee on Un-American Activities operated at the time the complaint in this action was filed was H. Res. 8, 89th Cong., 1st Sess., 111 Cong. Rec. 21, providing in pertinent part:

> *Resolved,* That the Rules of the House of Representatives of the Eighty-eighth Congress, together with all applicable provisions of the Legislative Reorganization Act of 1946, as amended, be, and they are hereby adopted as the Rules of the House of Representatives of the Eighty-ninth Congress * * *.

The pertinent provisions of the Legislative Reorganization Act thereby incorporated and other pertinent federal statutes are set out in the petition at pp. 5-8.

QUESTION PRESENTED

Whether a Rule of the House of Representatives is an "Act of Congress" within the meaning of 28 U.S.C. 2282, so that an action seeking to enjoin the operation of a Committee of the House of Representatives under that Rule is one "required * * * to be heard and determined by a district court of three judges" (28 U.S.C. 2284).

STATEMENT

On July 14, 1966, the House Committee on Un-American Activities (the Committee) resolved to hold hearings in Washington, D.C., to investigate certain

conduct deemed to support, in various ways, the North Vietnamese side of the Vietnam conflict.[1] In accordance with Rule XIV of the Committee's Rules of Procedure (Revised 1965), Chairman Edwin E. Willis appointed a subcommittee of five members with Honorable Joe R. Pool as chairman to conduct the hearings. (Hearings, *infra*, 920.) Petitioners were subpoenaed to appear before the subcommittee in Washington on August 16, 1966.

[1] BE IT RESOLVED, That hearings by the Committee on Un-American Activities, or a subcommittee thereof to be designated by the Chairman, be held in Washington, D.C., or at such other place or places and on such date or dates as the Chairman may determine, relating to (a) the extent, character, and objectives of organizations and groups within the United States which solicit money, supplies, and material assistance for delivery to, or in aid of, Communist powers or forces engaged in armed conflict with the United States; (b) the extent, character, and objectives of organizations and groups within the United States which advocate or employ force, physical impediments, or any unlawful means to obstruct the movement of personnel and supplies of the armed forces of the United States; (c) the extent, character, and objectives of organizations and groups within the United States which engage in activities designed to impair or interfere with the loyalty, morale, or discipline of the armed forces of the United States and the recruitment of personnel for such forces; (d) Communist propaganda activities in the United States conducted in support of the Communist regime in North Vietnam, or for the purpose of advancing the policies and objectives of the world Communist movement generally; (e) the activities of United States citizens acting on behalf of, or in the interest of, foreign Communist principals, and foreign travel undertaken by United States citizens in connection with such activities; and (f) all other questions in relation thereto, for the following legislative purposes:

(1) To provide factual information to aid the Congress in the disposition of presently pending legislation, including but

The day before the return date of the subpoenas, the petitioners began this action, seeking a temporary restraining order against conduct of the hearings, the convening of a three-judge district court, injunctive protection against anticipated contempt proceedings, and a prohibition against further operations by the Committee under the authority of Section 18 of

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not limited to H.R. 12047, H.R. 14925, and H.R. 16175, bills to amend the Internal Security Act of 1950, which would make punishable the giving of certain assistance to foreign powers engaging in armed hostilities with the United States and the obstructing of the free movement of personnel and supplies of the armed forces of the United States.

(2) Consideration of the advisability of amending the Internal Security Act of 1950, with particular reference to section 6 of such Act to regulate travel abroad by citizens of the United States, the registration of Communist organizations, and making punishable the obtaining of money or property by fraud to benefit a foreign government or alien.

(3) Consideration of the advisability of amending the Subversive Activities Control Act of 1950 so as to impose certain disabilities in the manner and form therein provided upon those persons who are "affiliated with" Communist organizations, as well as upon persons who are members thereof.

(4) To provide factual information to aid the Congress in the proposal of any necessary remedial legislation in fulfillment of the authority and directions contained in the mandate to the committee by House Resolution 8 of January 4, 1965, and Public Law 601 of the 79th Congress.

Investigative Hearings before the Committee on Un-American Activities, House of Representatives, Eighty-Ninth Congress, Second Session, August 16–19, 1966, entitled "Hearings on H.R. 12047, H.R. 14925, H.R. 16175, H.R. 17140, and H.R. 17194—Bills to Make Punishable Assistance to Enemies of U.S. in Time of Undeclared War", Part 1, pp. 916–917 (hereinafter, "Hearings").

Rule XI of the House of Representatives (the Committee's authorizing resolution). The complaint, very similar to that in *Stamler and Hall* v. *Willis,* pending on jurisdictional statement, Nos. 478, 479, this Term, alleged that the pending Committee hearings and the Rule constituting the Committee's charter were unconstitutional.

A three-judge court was convened and immediately dissolved a temporary restraining order that had been granted by a single judge. Petitioners appeared at the hearings but failed to respond when called to testify (Hearings 1070–1071, 1160).

The Committee did not report the petitioners for a possible contempt of Congress citation, with the result that the validity of the subpoenas and the propriety of the 1966 hearings are not now issues in the case. The only significant issue remaining on the merits is whether—assuming the Committee would continue to operate in future Congresses under a charter like Rule XI—it should be restrained from doing so.

The three-judge court did not reach this issue, but rather dissolved itself as improperly constituted; it held that the Rule under attack was not an "Act of Congress" within the meaning of 28 U.S.C. 2282 and thus that the case was not susceptible of determination by a three-judge court under 28 U.S.C. 2284. The court of appeals affirmed this action and the case remains pending before a single judge of the district court.

ARGUMENT

The only matter before this Court is the holding of the district court and the court of appeals that a three-judge court is not required because petitioners' challenge is not to an "Act of Congress" within the meaning of 28 U.S.C. 2282. For the reasons set forth in our Motion to Dismiss or Affirm in *Stamler and Hall* v. *Willis* (Nos. 478 and 479, this Term) at pp. 8–12, we believe that this holding that the case is one for a single judge was correct.[2] Moreover, the posture of this case makes the question one of limited practical significance here. The courts below did not deny petitioners a federal remedy, but merely remitted them to the normal procedures for consideration of their substantive contentions in the district court. Further review at this stage would only delay consideration of those substantive contentions on their merits.

Without repeating our argument in *Stamler and Hall,* we have the following further observations with respect to petitioners' contentions here.

1. Apparently conceding (Pet. 23–25) that the decision of the court below was correct as to the status of a rule of Congress under the three-judge statute, petitioners rest their case upon the proposition that the Committee has an "alternative source of authority"

[2] Petitioners appear to argue that the "Act of Congress" question had been waived. The question is, however, jurisdictional and could properly be raised at any stage of the proceedings, by the parties or by the court on its own motion. Fed. R. Civ. P. 12(h); cf. *Flemming* v. *Nestor*, 363 U.S. 603, 607, where "[n]either party requested a three-judge court below," and this Court seems to have raised the issue on its own motion.

in the Legislative Reorganization Act of 1946, 60 Stat. 812. Saying that the provisions of the Reorganization Act relating to the Committee do fall within the definition of 28 U.S.C. 2282, they go on to assert that three-judge jurisdiction over the whole case exists by analogy to the principles of *Flast* v. *Cohen,* 392 U.S. 83, 90–91, because they attack both the Rule and the Act.

This approach fails because the three-judge court properly held that the Committee draws its authority only from the House Rules adopted for each Congress and not at all from the Reorganization Act. In fact, the Reorganization Act provisions relating to the Committee have never had any effect as a charter for the Committee except insofar as they have been specifically incorporated by reference in Rules adopted by the House in the normal course. With limited exceptions not here pertinent, Title 1 of the Act (which includes these provisions) was not to take effect until January 2, 1947, when the next Congress was scheduled to convene (§ 142, 60 Stat. 834). But when that Congress did convene, the House adopted the following resolution (93 Cong. Rec. 38):

> *Resolved,* That the rules of the House of Representatives of the Seventy-ninth Congress, together with all applicable provisions of the Legislative Reorganization Act of 1946, be, and they are hereby, adopted as the rules of the House of Representatives of the Eightieth Congress * * *.

In each successive Congress the House of Representatives has adopted Rules from which the Committee's authorization is derived.[3]

[3] See *Watkins* v. *United States*, 354 U.S. 178, 203, n. 44.

The difficulties of petitioners' analysis are revealed by considering how one would treat an authorizing resolution once embodied in the Reorganization Act, but subsequently amended, as expressly contemplated in Section 101(b) of the Act, by a vote of the House alone. Petitioners do not claim that such an amendment—*i.e.*, a House Rule "pure and simple"—should be considered an "Act of Congress." Treating the original resolution, but not its subsequent amendments, as part of an "Act of Congress" would create an anomalous situation.

Denying the Reorganization Act force insofar as authorization of the Committee and other House Committees are concerned is quite possibly required by the Constitution (Art. I, Sec. 5), and in any event does not (as petitioner suggests) erase the existence of the statute entirely or attribute an absurdity to the Congress (Pet. 25–26). Titles 2, 3, 4, 5, and 6 of the Act, which comprise its great bulk, deal with legislative subjects and unquestionably have continuing force;[4] they are not subject to the unusual provisions of Section 101 that Title 1 is "an exercise of the rule-making power" of each House and subject to unilateral amendment by either. Nor was Congress' enactment of Title 1 as so limited an absurdity or useless exercise. It seemed desirable to have a hard look at the rules structure of the House and Senate as a whole; the process of examination rather than any necessary force of the end product would then be ample justification for the exercise, and the form in which the

[4] Opinion of the three-judge court, n. 3 (Pet. App. 12a).

product was promulgated may have been chosen only to emphasize the care that had been taken. Or it may have seemed important to give broader publicity and a more unified statement to the rules than they might otherwise have received.

Moreover, petitioners' attempt to base three-judge court jurisdiction upon the Reorganization Act is in any event unsupportable because the provisions of the Act relating to the Committee did not even purport to be anything more than, in the words of Section 101(a) of the Act itself, "an exercise of the rule-making power of the * * * House of Representatives * * *" (60 Stat. 814). Thus, without regard to the fact that the piece of paper in which they appeared was approved by both Houses of Congress and signed by the President, the unusual nature of the provisions in question made them by their nature not an "Act of Congress".

Thus, the courts below properly treated the question as whether the Rules of one House of Congress are or are not "Acts of Congress" within the technical meaning of 28 U.S.C. 2282. They necessarily answered that question in the negative.

2. Petitioners' catalogue of the instances in which the Committee, the courts and the Department of Justice have used language referring loosely to the "Reorganization Act" as the source of the Committee's authority lacks any persuasive force. Petitioners have pointed out no usage of such language in a situation where the distinction between an Act of Congress and a Rule of the House of Representatives was in any way determinative.

Moreover, this Court has—when related questions have been directly raised before it—indicated clearly the view that the Committee has no continuing authority and must be constituted afresh by the House Resolution adopting the Rules for each Congress. In *Gojack* v. *United States,* 384 U.S. 702, 706–707 n. 4, this Court held that "the authorization of a 'major investigation' by the full Committee must occur during the term of the Congress in which the investigation takes place. Neither the House of Representatives nor its committees are continuing bodies. Cf. *Anderson* v. *Dunn,* 6 Wheat. 204, 231; *Marshall* v. *Gordon,* 243 U.S. 521, 542. It is the practice of the House to adopt its Rules—including the Rule which establishes the Un-American Activities Committee and defines the scope of its authority—at the beginning of each Congress." The Court's opinions have consistently traced the Committee's authority to the rules adopted at the beginning of each Congress rather than the Act. *Watkins* v. *United States,* 354 U.S. 178, 203; *Barenblatt* v. *United States,* 360 U.S. 109, 115, 120 n. 15.

3. Petitioners seek to strengthen their arguments by reliance on this Court's past practice of referring to the whole of the Committee's history in determining the merits of individual cases arising out of a single Congress. We concede the validity of such historical analysis where the passage of time reveals that Congress has not, in fact, altered the scope of the Committee's authority. But the fact that the activities of a biennially reconstituted body have had

a certain continuity in the past does not eliminate the necessity for its biennial reconstitution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 633

DR. ALLEN M. KREBS and WALTER D. TEAGUE, III, on their own behalf and on behalf of all other persons similarly situated,

Petitioners,

—v.—

JOHN M. ASHBROOK, JOHN H. BUCHANEN, JR., DEL CLAWSON, JOE R. POOL, RICHARD ICHORD, WILLIAM M. TUCK, GEORGE F. SENNER, JR., CHARLES L. WELTNER, EDWIN E. WILLIS, individually and as Chairman and Members of the Committee on Un-American Activities of the United States House of Representatives; DAVID G. BRESS, United States Attorney for the District of Columbia,

Respondents.

PETITIONERS' RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION

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PETITIONERS' RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION

Petitioners Agree That There Is a Critical Need for a Speedy Determination of the Constitutional Questions Raised Herein

Petitioners wish to stress their agreement with the major point on which Respondents have based their argument in opposing our petition for certiorari to this Court, that is,

that the petition raises important substantive contentions the consideration of which must not be further delayed. (Brief for Respondents in Opposition, p. 6.) Respondents have argued that plenary review by this Court should not be granted because it would delay District Court "consideration of those substantive contentions on their merits"—contentions raised both in this case and in *Stamler* v. *Willis*, Nos. 478, 479, this Term. Although Respondents expressly incorporated in this case their procedural argument tendered in *Stamler* v. *Willis* concerning whether the constitutional questions should be heard by one judge or three, they have gone to pains to avoid incorporating their substantive arguments although the constitutional questions are identical. It appears that they have little confidence in those arguments and no concern for the inconsistency of result which they seek.

Both Petitioners and Respondents are plainly concerned that the important First Amendment questions raised herein be promptly considered. Just over one month ago, in October, 1968, the House Committee on Un-American Activities resumed hearings under the mandate which we challenge. One of the persons even now under continuing subpoena and ordered to reappear before the Committee on December 2, 1968, had unsuccessfully sought to intervene in this case shortly after it was commenced in 1966. The speedy determination of the substantive questions raised by Petitioners is of great concern not only to all of the parties in this action and in *Stamler,* but also of immediate concern to those who are subject to outstanding Committee subpoenas and of paramount importance to the First Amendment itself.

One of the two major reasons for the creation of the three judge court procedure under 28 U. S. C. 2282 was

to facilitate a speedy final determination via direct review to this Court when an injunction is sought against an allegedly unconstitutional act of Congress and the program it authorizes. Consistent with this purpose, the three judge court should be reconvened to rule on the merits of the questions raised by Petitioners.

Many of the issues raised by Petitioners have been presented to the three judge court below, and in fact were before that court for many months before it chose to avoid the sensitive character of those issues by dissolving itself on the tenuous distinction between identical provisions in the challenged statute and rule (that distinction was rejected by Chief Circuit Judge Bazelon, who preferred to proceed with the substantive matters, as well as by the Seventh Circuit in *Stamler*). As Justice Harlan stated just last week in *Epperson* v. *Arkansas,* 37 LW 4017, 4022 (November 12, 1968), "[w]ith all respect, that court's handling of the case savors of a studied effcrt to avoid coming to grips with [these issues]."

Since, however, this Court has the power fully to determine now the constitutionality of the statutory mandate of the House Committee on Un-American Activities, Petitioners urge that this Court do so on the basis of plenary argument, thus delaying no further the long overdue determination of the critical First Amendment questions raised herein, issues which would ultimately and inevitably reach here again, thus obviating two major trials of identical issues which would consume the time and energy of possibly six federal judges for a lengthy period and eventually require the attention of this Court anyway.

Petitioners Have *Not* Abandoned the Principle That Even If Rule XI Were Alone Challenged a Three Judge Court Would Be the Required Forum

Respondents have mistakenly stated (Brief for Respondents in Opposition, p. 6) that Petitioners concede that, if Rule XI alone were the subject of this litigation, a three judge court would not be required. This is definitely *not* the case. To the contrary, Point 5 of our Petition for Certiorari, pp. 29-30, shows that the policy behind 28 USC 2282 requires that a three judge court determine the constitutionality of this major congressional committee regardless of whether Rule XI alone, or the identical provision in the Legislative Reorganization Act of 1946, were challenged. This position was briefed and argued rather more fully in the Court of Appeals. (Brief and Appendix for Appellants, pp. 27-30.*) We would also incorporate the arguments presented by Appellants in *Stamler* v. *Willis*, appearing on pages 17-21 of

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* Petitioners noted for the court below that, as pointed out by Chief Circuit Judge Bazelon in his dissent from the opinion of the three judge court, *Krebs* v. *Ashbrook*, 275 F. Supp. 111, 120 (D. C. D. C. 1967), §2282 "speaks of 'any Act of Congress,' and neither Congress nor the Supreme Court has provided us with sufficient guidance to carve out exceptions to it." The words "Act of Congress" are nowhere defined in the United States Constitution or in 28 U. S. C. 2282 or 2284. Nowhere are they limited to what traditionally is meant by the words "law" or "statute," and even the latter term has on occasion been given a somewhat flexible meaning by this Court. See *Methodist Federation for Social Action* v. *Eastland*, 141 F. Supp. 729 (D. C. D. C. 1956), *Liveright* v. *Joint Committee of the General Assembly of the State of Tennessee*, 279 F. Supp. 205 (M. D. Tenn., 1968), *A. F. of L.* v. *Watson*, 327 U. S. 582 (1946), *Stevens* v. *Griffith*, 111 U. S. 48 (1884) and *United States* v. *Rumely*, 345 U. S. 41 (1953), all discussed by Petitioners below, supporting our contention that the words "Act of Congress" encompass not only the type of act (statute) exemplified by the Legislative Reorganization Act of 1946, but also such a Congressional act as Rule XI itself.

Appellants' Reply to Motion to Dismiss or Affirm. Respondents' mistaken assertion that we have conceded the contrary merely underscores their failure to recognize and accept the overriding purpose of the three judge court procedure—to insure that three judges, not merely one, will share the responsibility of determining whether to issue an injunction against one of the *most* sensitive of congressional regulatory schemes, the political investigation of our citizens.

Finally, Respondents suggest that the Committee, the Courts, and the Department of Justice, in referring to the Legislative Reorganization Act as the authority for the Committee, have made those references "loosely" (Brief for Respondents in Opposition, p. 9). Certainly, the Department does not draw its criminal indictments loosely, nor does this Court write its opinions loosely. Such an assertion seems to be of the same order as that the Legislative Reorganization Act itself was merely an "historical accident" (*Stamler* Motion to Dismiss or Affirm, page 8) or that Rule XI of the Act is merely a simple inconsequential "piece of paper" (Respondents' Brief, page 9) rather than the authority for an investigatory scheme whose power and impact have been felt by thousands if not millions of Americans over its history and which is currently being felt and will be increasingly felt by countless more in absence of the judicial protection sought in this action.

Perhaps Respondents are right in arguing that neither the Committee nor the Department, much less any court, was thinking of technical differences between Statute and Rule when they made the early references to authority mentioned above, but there can be no doubt that their intention, in making such references, was to buttress subpoenas,

questions and threats, charges and convictions of contempt with the full weight and authority of a law, a statute, an Act of Congress. The repeated demands that witnesses divulge their beliefs and associations, despite claims of constitutional protection, were routinely expressly based on Public Law 601. It is incredible that the Committee members thought or wanted their victims to think that they were merely acting in exercise of a rule making power delegation rather than pursuant to an Act of Congress.

In Light of the Granting of Certiorari in *Adam C. Powell* v. *McCormack* Certiorari Should Be Granted Herein

On November 18, 1968, this Court granted certiorari in the case of *Powell* v. *McCormack,* #138, this Term, on the following question among others:

> Whether the District Court erred in refusing to certify the necessity for a three judge statutory court and, if so, whether this Court should order the convening of such a court to grant forthwith the relief prayed for herein.

Since granting a three judge court in *Powell,* which involves solely a House resolution, would logically necessitate the granting of a three judge court herein, where, as in *Stamler,* a House resolution and an identical statute are involved, but denial of such a court in *Powell* would not compel a denial herein, this case presents issues of conceded importance which should also be answered by this Court.

CONCLUSION

As Respondents have pointed out, both the District Court and the Court of Appeals have decided that we are to have our day in court to determine the overriding constitutional questions raised herein. Respondents have also asserted the appropriateness of a speedy determination of those substantial constitutional questions. Petitioners therefore pray that this Court make a full and complete determination of all the issues raised herein on the basis of plenary argument or, in the alternative, that it reverse the decision below and remand this cause to the reconvened three judge court for a prompt trial.

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